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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 15

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

UNITED STATES GYPSUM COMPANY, NATIONAL  
GYPSUM COMPANY, CERTAIN-TEED PRO-  
DUCTS CORPORATION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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What is an audit report?

The WITNESS. Well, I don't understand the question, Your Honor, in reference to this.

Mr. ADAMS. May I look at it, please?

Justice STEPHENS. Yes, you may look at it.

Mr. ADAMS. I think it ought to be indicated that it is not our report.

Justice STEPHENS. It is being used, we understand, only to refresh recollection. Do you recognize this report, Mr. Brown?

The WITNESS. No, sir.

By Mr. STEFFEN.

Q. Did you have any familiarity with audits conducted by the U. S. Gypsum Company into your sales of gypsum board after you signed the license agreement?

A. I don't recall any.

1670 Q. Did you have anything to do with it, is my question?

A. No, sir.

Q. Do you know whether or not they did audit your sales?

A. I think they did.

Q. Might that be such an audit?

A. It might be, but I had nothing to do with it.

Q. I want you to look at page 11 there, and I want to ask you this question: Does that refresh your recollection at all concerning possible sales to distributors or jobbers during the years 1930 and 1931, of gypsum products?

A. No, sir, I don't remember.

Q. There is a whole list of names there. Do you know any of those concerns which are listed as distributors or jobbers?

A. Most of them seem to be on the Pacific Coast, which I wasn't familiar with.

Q. Look at the next page. What does it mean by "additional jobbers' commissions—Philadelphia," if you know?

Mr. ADAMS. I respectfully object. The question is whether or not his recollection is being refreshed by this document, not what this document says. It is not for him to interpret it, particularly since it is not a document which was prepared by him or isn't even an audit report of the Certain-teed Products Corporation.

1671 Justice STEPHENS. The Court thinks the witness understands that.

You are not asked to tell what the exhibit means, but whether or not the items that Mr. Steffen calls to your attention refresh your recollection with respect to the sales methods of the company with respect to gypsum products. If it does refresh your recollection, say so; and if it doesn't, say that it doesn't.

The WITNESS. I remember nothing about the Philadelphia and Buffalo area, and the Pacific Coast I had nothing to do with.

1672

By Mr. STEFFEN.

Q. What area did you have to do with?

A. East of the Rocky Mountains; we had a vice-president on the Pacific Coast.

Q. But Philadelphia and Buffalo would be East of the Rocky Mountains?

A. I testified that I didn't remember anything about those.

Q. Do you remember anything about the Southern or Southeastern area?

A. No, sir.

Q. Are you still sure that you did not sell through distributors?

A. That was my memory.

Q. Now in the last paragraph there on page 2 of Government's Exhibit 214 there is a discussion of the possibility of getting different prices in different areas in the Chicago district. What is your understanding of that?

A. I don't remember that.

Q. Now refer to Paragraph 4 on page 2 of your letter, Mr. Brown, where it says, "It has been repeatedly stated" that if the license agreement gets unduly burdensome, Mr. Avery or U. S. G. would release the licensee from the burden. Do you know anything about that?

A. No, sir.

1673 Q. Did you ever hear any discussion of that?

A. I don't remember.

Q. Do you know who is referred to by the word "others"—"It has been repeatedly stated to us by others"—?

A. No, sir.

Q. Did you ever have any conversation with Mr. Blagden about that?

A. None that I recall.

Q. With Mr. Griswold?

A. No, sir.

Q. Do you know Mr. Griswold?

A. I have met him.

Q. Did you ever talk with Mr. Griswold about the license agreement?

A. No, sir.

Q. Sir?

A. No, sir.

Q. Did you attend any of the Industries meetings?

A. Yes, sir.

Q. How often?

A. Pardon?

Q. How often?

A. I attended a good many of them; I don't know how often. I don't remember how many they had.

Q. How often would they be held, do you remember?

A. As I recall, there was no specific date for holding them.

Q. Were they held as often as once a month?

A. I don't think that often.

Q. Who did you meet out there from American?

Mr. BROMLEY. Could we have an indication of when he is talking about?

Mr. STEFFEN. During the year 1928 and early 1929.

Mr. BROMLEY. I object to that as too general.

Justice STEPHENS. It is unduly general; unless it is purely preliminary —

Mr. STEFFEN (interposing). It is just preliminary, to find out who he met and who he talked to.

Justice STEPHENS. You may do that.

By Mr. STEFFEN.

Q. Did you meet Mr. Griswold during 1928 or early 1929 out in Chicago at one of these Industries meetings?

A. I can't be that specific. I met him in the gypsum industry.

Q. And did you meet Mr. Blagden out there perhaps during this period of time?

A. No; my contact with him was only a few months after we bought the Beaver company.

Q. Did you ever discuss the license agreements with Mr. Blagden?

1675 A. I don't recall any discussions.

Q. Did you meet Mr. Eugene Holland out at any Gypsum Industries meetings?

A. I have met Mr. Holland at Industries meetings.

Q. Do you recall what you discussed with Mr. Holland?

A. I don't recall anything specific with Mr. Holland; he



just attended the meeting.

Q. What was taken up at the meeting concerning the license agreement?

A. It wasn't discussed at the Industries meeting, as I recall it.

Q. Did you meet with any of these men after the Industries meeting?

A. Socially is all.

Q. Did you ever discuss gypsum matters at a social meeting?

A. I don't recall any.

Q. Would you say that you never mentioned gypsum matters at any social meeting?

A. The question, please?

Q. Would you say you never discussed the license agreement or gypsum matters socially with Mr. Holland or Mr. Blagden or Mr. Griswold?

A. I never discussed the license agreement with them that I remember, with any of those men.

Q. Do you recall discussing it with anybody at all?

A. No, sir.

1676 Q. Would you say that you never discussed it with anybody?

A. No, sir.

Q. You simply don't recall?

A. I don't recall.

Q. I want to now refer you to Paragraph 5 on Page 2 of Exhibit 214, in which you say, "Will you grant the license for the use of the Beaver plants only, excluding any other plants that we may have now or in the future"?—and ask if you ever got a reply to that?

A. I don't remember.

Q. Do you recall whether you ever took out a license covering Beaver and not Acme?

A. I don't think we did.

Q. I now want to show you Government's Exhibit No. 215 which purports to be a letter from Mr. Henning to the Certain-teed Products Corporation under date of March 29, 1928, in reply to your letter of March 23rd. I will ask you if you are familiar with that letter and can identify the signature?

A. I can identify the signature as Mr. Henning's, in my opinion.

Mr. STEFFEN. I offer Government's Exhibit No. 215 in evidence.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. It may be received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

1677 (The document referred to marked as Government Exhibit 215, was received in evidence.)

By Mr. STEFFEN.

Q. I call your attention to the initials at the top of the letter, Mr. Brown, and ask you who G. M. B. was?

A. Mr. George M. Brown.

Q. And C. O. B. was yourself, I take it?

A. That is right.

Q. And D. C. C., just to the right of your initials, or whatever those are?

A. That was Mr. Cale, vice-president.

Q. And who is A. W., following your initials?

A. Mr. Audenreid Whittemore.

Q. And L. R. W.?

A. Mr. L. R. Walker.

Q. And S. W. C.?

A. Mr. S. W. Chaffee.

Q. And R. M. N.?

A. R. M. Nelson.

Q. And what does "Copies sent Adkins & Jacobs" mean?

A. I assume those were our counsel.

1678 Q. In the second paragraph of that letter, it says, "The questions you put in reference to the license conditions have been fully discussed by you with the president of our company," and so forth. Did that refer to you, Mr. C. O. Brown?

A. I don't think so, I think that referred to the company.

Q. Well, they would have to talk with somebody; who did they have in mind, do you know?

A. Mr. George Brown, in my opinion.

Q. I now show you Government's Exhibit 216 for Identification, which purports to be a copy of a letter written by Mr. C. O. Brown to the United States Gypsum Company under date of April 4, 1928, and ask if you can identify it?

A. I can identify the signature as mine.

Mr. STEFFEN. I offer Government's Exhibit No. 216 in evidence.

Mr. ADAMS. May I ask one question here?

Justice STEPHENS. Yes.

Mr. ADAMS. Is that an original that is being offered, or a copy?

Mr. STEFFEN. I think that is an original. He identifies it as his signature. It is an original, yes.

Mr. ADAMS. Thank you.

Justice STEPHENS. Is there any objection except the usual one?

1679 Mr. BROMLEY. No sir.

Justice STEPHENS. The letter is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government Exhibit No. 216, was received in evidence.)

By Mr. STEFFEN.

Q. Do you know whose writing that is on the bottom, "Please make no reply"?

A. No sir.

Q. What are the initials?

A. It looks like S.H.A.

Q. Might it be S.L.A.?

A. I don't know, sir.

Mr. BROMLEY. It is Mr. Avery's writing.

By Mr. STEFFEN.

Q. Those are Mr. Avery's initials, S.L.A.?

A. Yes sir.

Q. I now show you Government's Exhibit 217 which purports to be a copy of Exhibit 216 which has just been introduced in evidence, and I ask you to identify those initials, if you can, at the top?

Justice STEPHENS. Where is that in this file?

Mr. STEFFEN. It is Item No. X-327. It follows this other one immediately. It purports to be a carbon  
1680 copy of the letter just introduced, and I merely want to show that various members of the company were aware of it.

Justice STEPHENS. Thank you.

The WITNESS. Do you wish me to call the initials?

Mr. STEFFEN. Yes.

Mr. ADAMS. I object to any suggestion that these people were shown by this letter to be aware of anything. Their initials appear on the letter, and that is all.

By Mr. STEFFEN.

Q. Can you identify the initials?



A. Yes sir, I can identify them.

Q. Can you tell us whether it was the practice to circulate letters of this sort among the several members of the management?

A. Yes, at times.

Q. And what does this indicate?

A. It indicates that it was circulated to these men.

Q. And these men are who? Just name them, please?

A. Mr. D. C. Cale; Mr. George M. Brown; Mr. A. Whittemore; Mr. S. W. Chaffee; Mr. L. R. Walker; Mr. R. M. Nelson; and Mr. B. B. Watson.

Mr. STEFFEN. I offer Government's Exhibit No. 217 in evidence.

Mr. ADAMS. I object to it if it is offered as proof that a copy of this letter ever went to the men whose 1681 initials appear on it. I have no objection to it otherwise.

Justice STEPHENS. I think that objection goes to the weight of the document, Mr. Adams. The objection is overruled. Admitted in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 217, was received in evidence.)

Mr. STEFFEN. This concludes one branch of the testimony; may we have a few moments' recess?

Justice STEPHENS. We will take a recess of five minutes at this time.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

1682 By Mr. STEFFEN.

Q. Mr. Brown, do you recall any further correspondence between Certain-teed and U.S.G. between the dates of April 4, 1928, and May 22, 1929, when the license agreement was signed, which you may have signed?

A. I don't recall any such letters.

Q. The letter of April 4 would seem to indicate that you were not going to take out a license with USG. Yet, in May, 1929,—May 22, 1929,—a license was taken out. I want to ask you some questions concerning that period of a year and a month, and particularly to find out what you know concerning the reasons why your company changed over.

First, I would like to direct your attention to sales conditions during that period. Are you able to tell us any-

thing concerning the price of gypsum board during that period?

A. Only open-edge. That was sold at a low price.

Q. Sold at a low price—what do you mean by that? Low with reference to what?

A. It was sold low with reference to closed-edge board.

Q. Was it sold at a different price in 1929 than it was in the beginning of 1928?

A. I don't remember that.

Q. You mean you don't remember whether the prices were changing in 1928?

A. No, sir; I don't.

1683 Q. Could you give us any idea at all as to whether there was price competition in 1928 and 1929?

A. It is my memory that there was price competition, but the trend, I don't remember.

Q. You don't remember whether the trend was up or down during 1929—are you sure of that, Mr. Brown?

A. I think it was down, but I am not positive.

Q. Do you know what the Beaver Products Company was selling board at in 1927, No. 1 board?

A. No, sir.

Q. Do you know whether they were changing their price in 1927 and 1928?

A. No, sir.

Q. I show you Government's Exhibit 218, which purports to be a memorandum from Warren Henley to Mr. Blagden, under date of December 13, 1927, and ask if you can identify Mr. Henley's initials there at the bottom of the letter?

A. I don't believe I am familiar enough with them to positively identify them.

Justice STEPHENS. Is that an original that the witness has, and are the initials in handwriting?

Mr. STEFFEN. That is right. Those are just the initials down at the bottom.

Justice GARRETT. Now what I have marked as Exhibit 218, is signed, "Warren Henley" in typewriting.

1684 Justice STEPHENS. That is right, but apparently the original has some initials at the bottom.

Justice GARRETT. I see.

Mr. STEFFEN. That circle at the bottom contains some initials.

By Mr. STEFFEN.

Q. Did you know Mr. Henley?

A. Yes, sir.

Q. For how long a period?

A. From about 1928 until I left the company.

Q. In 1937?

A. Yes, sir.

Q. Do those look like his initials or not?

A. I think they are his initials.

Mr. STEFFEN. I would like to offer Government's Exhibit No. 218.

Mr. BROMLEY. I object to it as incompetent because not sufficiently identified. I also make the usual objection to it; and in addition, I object on the ground that it is immaterial because it is not in furtherance of any conspiracy, and it seems to me that the latter objection is certainly good. Here is what looks like a memorandum relating to a conference among officials of the Beaver Products Company about what their sales policy should be in 1927. It seems to me that by no stretch of the imagination could it be said to be in furtherance of any illegal combination such as is charged in the complaint, and therefore to be utterly immaterial to the charges in this suit.

Justice STEPHENS. Let the Court read it.

What is it offered for?

Mr. STEFFEN. It is not offered as a declaration of a co-conspirator, but it is offered as having a bearing on the price situation in 1927, and establishing that prices were changing at that time.

Mr. BROMLEY. Well now, if that is the limited purpose for which it is offered, here we have a situation where they had Mr. Blagden on the stand as a witness, and Mr. Blagden is the gentleman to whom this letter is addressed, and they asked him no questions about it at all. Instead, they take a witness who had nothing to do with it, to-wit Mr. C. O. Brown, and attempt to get it in through him. It seems to me that under those circumstances the Court ought to be a little stricter in qualifying it on the ground of identification. If it is what it purports to be why wasn't Mr. Blagden asked about it so we could cross-examine him about it?

Mr. ADAMS. I have the further objection that it is not a proper method of proving anything with reference to price at that time.

Justice STEPHENS. Will you state again, Mr. Steffen, what you think it is relevant to? I don't quite understand.

Mr. STEFFEN. We offer it as a memorandum in which

Mr. Henley and Mr. Blagden are discussing prices, 1686 and it indicates that the price of board in 1927 was falling from \$30 to \$25, and we offer it for no other purpose.

As respects our failure to have Mr. Blagden identify it, that is simply a routine and rather minor matter. We never considered it necessary to have Mr. Blagden identify it.

Justice STEPHENS. First, on the subject of identification, let the Court ask the witness—do you recognize these as the handwritten initials of Mr. Henley, or do you not?

The WITNESS. In my opinion they are, your Honor.

Justice STEPHENS. I am not asking you about your opinion. Were you familiar with his initials?

The WITNESS. After this period, not at that time.

Justice STEPHENS. What contact did you have with him; how did you happen to see his handwriting?

The WITNESS. Correspondence, your Honor.

Justice STEPHENS. And based upon your correspondence with him, you do recognize these as his initials?

The WITNESS. Yes, sir.

Mr. STEFFEN. We have one other memorandum, I notice, here with Mr. Henley's initials on it.

Justice STEPHENS. We think, Mr. Bromley, your objection would have been well taken if the identification was insufficient, but inasmuch as the witness does apparently know these initials, it seems to us that it is not well taken as to the identification question; and we think the 1687 balance of your objection goes to the weight of the exhibit.

Mr. ADAMS. May I ask him one question as to identification? I don't think the witness is clear on it.

Justice STEPHENS. Yes.

Mr. ADAMS. Mr. Brown, is it your view here that these in your opinion are Mr. Henley's initials, or are you testifying as a positive fact that you now state that these are his initials? We want to know whether it is an opinion on your part or whether it is a positive identification by you.

Mr. STEFFEN. I think that is cross-examination, your Honor. There is always a measure of opinion in any identification, there has to be.

Mr. ADAMS. I asked the question because I honestly feel that the witness did not understand the purport of your Honor's last two or three questions. The witness first stated flatly that it was his opinion, and that is what I want



to get at, whether it is his opinion or whether he now testifies definitely from his own positive recollection that these are Mr. Henley's initials.

Justice STEPHENS. This isn't a question of recollection, but of recognition, Mr. Adams. We think it cuts too fine to make the objection. Every statement of a witness that a name or initial is—even if he states it in terms of a fact—an initial of someone else, is necessarily an inference and in that sense an opinion.

1688 Mr. ADAMS. I agree on that, but also I would like to know—in that sense I agree that your Honor can permit him to testify and perhaps receive the document—but I honestly don't know at this stage whether the witness is testifying to that kind of a factual opinion, if we might so describe it, or whether he is just venturing a speculation.

Justice STEPHENS. We think the answers of the witness to the Court's questions have made clear that he does recognize this on the basis of correspondence as the initials of Mr. Henley. Of course that is, as we all know, necessarily in a strict psychological sense an inference, but it is not an objectionable inference. Overruled.

By Mr. STEFFEN.

Q. I want to refer you, Mr. Brown, to paragraph 5 in which it says that there is "a decline in the market to a basis of \$25.00 per thousand on No. 1 board in the \$30.00 markets", and so forth. Can you tell us whether you remember that decline?

A. I would have no way of knowing about it because we were selling open-edge board and paying no attention to these things.

Q. Well, were you in competition with Beaver or not?

A. Yes.

Q. And would a price change on the part of Beaver have any bearing on your prices?

1689 A. We would find it out in the field possibly, but I would know nothing about this memorandum.

Q. That is right. Did you find out in the field that they were cutting prices from \$30 to \$25?

A. I don't remember on this specific date.

Q. Do you remember on any date? I merely want to get your general understanding on this matter.

A. Well, I have no memory of it except that prices of open-edge board were reduced during that period, as I recall it.

Q. By "that period", you mean what?

A. 1928-1929.

Q. And do you know what the prices of No. 1 closed-edge board were for the period prior to 1927 for two or three years?

A. No, sir.

Q. What do they mean by a "\$30 market", do you know?

Justice STEPHENS. Which company was Henley with, refresh our recollection.

Mr. STEFFEN. He was with the Beaver Products Company, which was being taken over by Certain-teed within a month after this letter was written.

Mr. OLIVER. I object to that question asking this witness what he meant by that phrase.

Mr. STEFFEN. I want to know what his understanding is.

Justice STEPHENS. Let's hear the question.

1690 (Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Well, as the question is phrased it is objectionable. If the witness knows himself what was meant by a "\$30 market" at that period of time, as a salesperson, he may state.

By Mr. STEFFEN.

Q. Will you answer the Court's question?

A. I do not know.

Q. Was there a usage of "\$30 market" in the trade?

A. As I recall, closed-edge board sold at \$30. Whether it was in this period or not, I don't recall, but I know nothing about special markets.

Q. Now what is the difference, if you know, between a No. 1 and a No. 2 board?

A. I don't know.

Q. Did you make a No. 1 or a No. 2 board at Certain-teed's Acme plant?

A. No, sir.

Q. What did you call it?

A. We just called it Certain-teed board.

Q. It was an open-edged board. Was it in competition with No. 1 or No. 2 board with a closed-edge, or do you know?

A. I don't know. It was in competition with gypsum board, that would be my memory.

1691 Q. Would it be in competition with the \$30 board or the \$25 board?

A. Both of them, I presume.

Q. Let me ask you if you know what National was selling board or plaster at during 1928.

A. No, sir.

Q. Do you know what the trade name of United States Gypsum board was during this period?

A. Sheet Rock.

Q. Did they have another name for another board that they sold during this period?

A. I don't remember.

Q. Did you ever hear of Crown board?

A. I don't remember.

Q. Would you know whether Crown board sold at the same price as Sheet Rock, if they made Crown board?

A. No, sir.

Q. I show you, then, Government's Exhibit No. 219, which purports to be a copy of a letter by Mr. Baker to Mr. Barrett, Mr. Baker writing under date of July 21, 1928, and ask you to look at the first paragraph and see if that refreshes your recollection.

Mr. ADAMS. As to what, please?

Mr. STEFFEN. As to whether the USG was making a board called Crown board, and as to the price of that board.

The WITNESS. It does not recall anything to me 1692 on Crown board.

By Mr. STEFFEN.

Q. Does the price "as low as \$13" mean anything to you?

A. I don't remember what the prices were.

Q. Was that price higher or lower than the price mentioned by Beaver in the preceding memorandum of Mr. Henley's?

Mr. ADAMS. I object to that. That is a matter of arithmetic.

Justice STEPHENS. That is true, except that one of those exhibits is not in evidence, and the other is, and the record might properly show what the two sets of figures are. Counsel may state that, however, if he wishes to, for the record, if it is of any importance.

By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, as to whether prices may have been falling in 1928?

A. Well, I stated previously that in my opinion they were declining.

Q. I want now to show you Government's Exhibits Nos. 220, 221 and 222 —

Justice STEPHENS (interposing). Has Exhibit 218 been offered?

Mr. STEFFEN. I believe so.

Justice STEPHENS. The objections were overruled, but I don't think the Court indicated any formal ruling on its introduction. It is received subject to the usual reservation as to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 218 was received in evidence.)

Justice STEPHENS. Do you wish this Exhibit 219, which was marked for refreshing recollection only, to continue bearing a number?

Mr. STEFFEN. It should be identified, yes, it may be sufficiently identified by a later witness to make it admissible.

Justice STEPHENS. Very well.

Mr. BROMLEY. May I remind your Honor that Exhibit No. 218 was not offered as a declaration? It is therefore my understanding that it is not in evidence against my client.

Mr. STEFFEN. It was offered only as indicating a price change about that time.

Justice STEPHENS. Then the reservation is withdrawn.

Mr. BROMLEY. As to Mr. Steffen's statement, our position is that it is no evidence as to price at all.

Justice STEPHENS. We think it may have some relevance and slight weight on the subject of an alleged price war.

Mr. FINCK. If your Honor please, I would like to make the same objection on behalf of National.

Justice STEPHENS. As to Exhibit 218?

1694 Mr. FINCK. Yes.

Justice STEPHENS. The record may show your objection.

Mr. JOHNSTON. If I may, if the Court please, I would like to state that I may want to object to it in the morning when I have had an opportunity to see it. Of course many of these exhibits we are not seeing at all down here. We were given, just before adjournment, a pad of proposed exhibits, but Exhibit 213, Exhibit 218 and Exhibit 219 and some others, are not in that bunch, and we have not seen them.

Justice STEPHENS. Mr. Berge told me Saturday that the exhibits proposed for one day were going to be submitted



to the defendants on the day before.

Mr. KNUFF. They were submitted on Saturday to Mr. Finck.

Justice STEPHENS. Why didn't you see them, Mr. Johnston?

Mr. JOHNSTON. I am just wondering, if the Court please, while we are on the subject, if one thousand proposed exhibits have been given to the Court, that is probably as many or more than will be offered these remaining eight days; and if one set is going to be given now for all the defendants the evening before, that means that all five or seven of us must, between the adjournment in the evening, and the convening of court the next morning, go through those and we are all living at different hotels scattered all over the city.

These exhibits must already be prepared. Why couldn't the Government give us these proposed exhibits in the same way that they are giving them to the Court?

1695 Justice STEPHENS. Mr. Johnston, the Court stated this morning that on each evening's recess the Court would, through Government counsel, let the defendants have the three copies of those exhibits which were submitted to the Court. So there will be four copies for the defendants.

Mr. JOHNSTON. I understand that, but that is not quite my point. My point is that they have already prepared this extra set that your Honors have. Now why do they want to wait until the evening before and hand out a few of those exhibits to us at a time? Why couldn't they let us have it in plenty of time before so we could pass it around among different counsel?

Justice STEPHENS. What about that, gentlemen?

Mr. STEFFEN. The answer is actually that we didn't have it prepared until very late on Saturday afternoon and it was a rush proposition even then. I would like to have the record also show, if it does not already, that we gave Mr. Adams a copy of most of these exhibits on December 1st.

Mr. ADAMS. Those are the ones that I turned over to Mr. Johnston, which he now has.

Mr. JOHNSTON. But that does not contain what you are offering.

Mr. STEFFEN. Not at the moment, that is correct.

Justice STEPHENS. The Court has used its very best efforts, gentlemen, to get some cooperation in this  
1696 situation, including an offer this morning by the

Court to let counsel for the defendants have the files which are handed to the Court. The Court sees no objection at all to these exhibits being given to the defendants in substantial bulk as many days ahead as is possible for the Government to do so. The new rules certainly contemplate that there should be no "shooting from ambush", to use a term of the West. Each side is supposed to be advised with respect to the opposite side's case by interrogatories and the like, but I fear, Mr. Johnston, that the Court has exhausted its resources.

We cannot compel the Government, any more than we can compel the defendant, to print photostats if it hasn't got the money to print them. We have asked the Government and the Government has promised that it will get these exhibits to you as early as it can. If it still can't do that, using its best efforts, we will simply have to use the third alternative and adjourn. Do you wish an adjournment now to inspect this exhibit?

Mr. JOHNSTON. No; I don't want to interrupt the trial that way because I can have it overnight. I presume I will have the right to make a motion in the morning to strike it.

Justice STEPHENS. Yes, but it is preferable that we have all the objections to any one exhibit made at one time so they will be all together in the record.

1697 Mr. JOHNSTON. I would like to ask counsel for the Government this question. Do you not now have another set of these proposed exhibits that you are going to offer, just the same as those sets which you have given to the Court?

Mr. STEFFEN. I have a set that I am working with, yes, and that is all.

Mr. JOHNSTON. How about the set that you are going to let us examine overnight?

Mr. STEFFEN. Mr. Finck has it already, and he has had it since Saturday.

Mr. JOHNSTON. A thousand?

Mr. FINCK. No, I haven't a thousand, I just have forty.

Mr. STEFFEN. That thousand up there were the first forty-three exhibits which were introduced on the first day. They have now been all photostated at the Court's request, and are available, three full sets.

Mr. JOHNSTON. I suppose there is nothing much else that either the Court or counsel can do. I do want to say this, that the Court's remarks about "shooting from ambush" gets down to language that I can understand, coming

from the West, but I just don't like to be shot at that way, I like to have an equal chance.

Justice STEPHENS. Will you hand this Exhibit 218 to Mr. Johnston, Mr. Reporter, and you take five minutes now to look at it and then you won't be shot at from ambush.

1698 Mr. JOHNSTON (after examining Exhibit No. 218). I think Mr. Bromley's objection is sufficiently broad.

Justice STEPHENS. The objections to 218 are overruled. We think they go to the weight. It doesn't seem to us that the statement in there is of very much weight, Mr. Steffen, but it may tend to show a price war through the statements of one of the predecessors in interest of one of the defendants. Your objections are therefore overruled, Mr. Finck and Mr. Johnston.

While we are on the subject of these exhibits, couldn't you gentlemen for the Government turn these proposed exhibits for tomorrow—and by "tomorrow" I mean each tomorrow—over to the defendants at four o'clock, when we adjourn, so that they can, before they disperse to their respective hotels, look through them?

Mr. STEFFEN. Are you referring to the ones that the Court has?

Justice STEPHENS. Those that you were intending to turn over to them.

Mr. STEFFEN. We have turned them over to Mr. Finck.

Justice STEPHENS. I am talking about the future, each afternoon.

Mr. STEFFEN. Each afternoon we propose to do that. As to this witness, the exhibits have been in the hands of defense counsel since December 1st, in part, and since last Saturday, in full.

1699 Justice STEPHENS. Thank you.

While we are interrupted on the subject of exhibits, will the court reporter hand one of these to counsel for the Government and one to counsel for the defendants? These are charts which I have had prepared by my law clerk, which somewhat comprehensively show the alleged history and relationship of these corporations, and the dates when board was commenced to be manufactured.

They are made up from the statements in the complaint.

We would like to have counsel for the Government and the defendants look them over during the evening, if possible, and state whether or not they think they are correct.

If so, they are a great aid to us in listening to this examination, because we can picture in that way, much more easily than otherwise, the relationship of the companies and the dates when they were incorporated, and when they commenced making board, and so on.

You may proceed, Mr. Steffen.

By Mr. STEFFEN.

Q. Can you give us any idea, Mr. Brown, of the price of your open-edge board in the early part of 1929 as respects the price in 1928?

In my opinion it was lower, but the actual price I have no memory of.

Q. I want to show you Government's Exhibits Nos. 220, 221, 222 and 223. Please look at just the first 1700 one, No. 220, and see if that refreshes your recollection concerning the price of board in the early part of 1929?

Justice-STEPHENS. What is Exhibit 220?

Mr. STEFFEN. That purports to be a competitive date record, your Honor, under date of March 1, 1929, with the name of Mr. Gallagher at the top.

By Mr. STEFFEN.

Q. Does that refresh your recollection at all concerning the prices of your board in 1929?

A. No, sir.

Q. Do you know who Mr. Gallagher is?

A. I assume he is the sales manager of United States Gypsum Company, or was at the time.

Q. Did you know him?

A. Yes, sir.

Q. Did you know the dealer mentioned there, A. H. Ringiaden?

A. No, sir.

Q. Did you sell in the Hazleton, Pennsylvania, market, do you remember?

A. We sold in Pennsylvania, I can't specify the town.

Q. Could you tell us as to your plaster prices in 1929? At what price was plaster selling?

A. I don't remember.

1701 Q. Would you give us an idea of how your price for wallboard compared with the rock lath price? I don't mean wallboard, I mean your lath price as compared with the USG rock lath price, in 1929.



A. I think it was lower.

Q. Can you tell us whether the prices in early 1929 were lower than they were in the beginning of 1928? Does this refresh you at all in that regard?

A. No, sir.

Q. Well, Mr. Brown, let's change the subject.

Your company did take out, I think we have brought out, a license with USG on May 22, 1929. You have examined the agreement?

A. Yes.

Q. Were you present at the meeting when that agreement was signed?

A. No, sir.

Q. Did you have any discussions with Mr. George Brown, who signed the agreement, concerning why he signed it?

A. None that I recall.

Q. Do you know why he signed it?

A. No, sir.

Q. Do you recall, Mr. Brown, any meetings at the Certain-teed plant between officers of your company and officers of either Ebsary or National or any of the other companies, concerning the possibility of taking out a 1702 license, during this period between April 4, 1928, and May 22, 1929?

A. I didn't attend any such meeting.

Q. Are you familiar with whether there were any such meetings during that period at your offices?

A. None that I know of.

Q. Did you talk with Mr. Walker during this period concerning any possible meetings that were held?

A. I don't recall any such conversation.

Q. I want to show you Government's Exhibit No. 203, and —

Mr. BROMLEY (interposing). That is for identification only.

Mr. STEFFEN. I think you are right, that is for identification only—and I will ask you to examine that signature. Are you familiar with that signature?

The WITNESS. I am not familiar with Mr. Black's signature.

By Mr. STEFFEN.

Q. Did you know Mr. Black?

A. I have met him.

Q. Now if you will refer to the third paragraph on the

first page it says that, "After the meeting"——

Mr. ADAMS (interposing). I respectfully object to this use of the document. There is no question pending as to whether the witness has any recollection:

Mr. STEFFEN. He has stated that he has no recollection concerning any such meeting.

1703 Mr. ADAMS. Then I think his attention should simply be directed to the letter and he should be asked if it refreshes his recollection on any specific point. I don't think that counsel should read the letter to the witness as he started doing. The letter, as counsel has stated, is not in evidence. This witness has stated that he cannot identify the signature.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Brown, whether the last paragraph particularly serves to refresh your recollection, that is the last paragraph on the first page of the letter.

A. On the first page?

Q. Yes.

A. I don't recall anything about it. The Mr. Brown referred to is evidently George M. Brown.

Q. It did not refer to you?

A. No, sir.

Q. Do you recall anything concerning a meeting at which Mr. Walker and Mr. Ebsary were present?

A. No, sir, I do not.

Q. Do you ever recall having met with Mr. Ebsary upon the matter of the license?

A. No.

Q. Did you know Mr. Ebsary?

A. Yes, sir.

Q. Do you know Mr. Lenci?

1704 A. Yes, sir.

Q. Did you ever talk with Mr. Lenci?

A. No, sir, not that I remember.

Q. Did you know Mr. Haggerty?

A. I met Mr. Haggerty once. He died shortly after I became acquainted with him.

Q. Did you ever have any discussion with him concerning the possibility of taking out a license agreement with USG?

A. No, sir.

Q. Following the agreement in 1929, May 22, 1929, when the license agreement was signed, did you have any

correspondence with USG concerning any other license agreements?

A. I don't recall any correspondence. Discussions developed later on.

Q. Was there a proposal made concerning a so-called "bubble" system?

A. Yes, sir.

Q. I show you Government's Exhibit No. 224, which purports to be a letter from Mr. Avery to Mr. George M. Brown under date of May 29, 1929. Can you identify that letter, please?

A. In what way, sir?

Q. Do you know the signature?

A. It is Mr. Avery's signature; I would say.

Q. Do you know the initials at the top?

1705 A. Yes, sir.

Q. Did you see the letter?

A. The initials would indicate that I did not, due to the fact that they aren't scratched off.

Mr. STEFFEN. I offer Government's Exhibit 224.

Justice STEPHENS. Let the Court read it.

Is there any objection?

Mr. BROMLEY. None except the usual one, sir.

Justice STEPHENS. Received in evidence, subject to the reservation with respect to declarations of alleged co-conspirators.

(The document marked Government's Exhibit No. 224 was received in evidence.)

By Mr. STEFFEN.

Q. Do you recall, Mr. Brown, when you first heard about this "bubble" system?

A. No, sir, I don't recall the date.

Q. Would it have been on or about this time, would you say?

A. Sometime in 1929, possibly at a later date, when I heard of it, I think.

Q. I would like now to show you what has been marked for identification as Government's Exhibit No. 225, which purports to be a letter from Mr. George Brown to Mr. Avery under date of June 4, 1929.

1706 We skip one in the exhibits that are before your Honors. We are skipping the memorandum and offering the letter which follows.

Justice STEPHENS. Just a minute, let me get this correct. All right.

By Mr. STEFFEN.

Q. Can you identify that Exhibit No: 225, Mr. Brown?

A. In what way, sir?

Q. Do you know the signature?

A. Yes, it is Mr. Brown's signature.

Mr. STEFFEN. I offer Government's Exhibit No. 225.

Mr. BRÖMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked Government's Exhibit No. 225 was received in evidence.)

Mr. STEFFEN. Our next exhibit, your Honor, will take I think a considerable amount of questioning.

Justice STEPHENS. Very well, we will take an adjournment at this time for the afternoon.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a. m., Tuesday, December 14, 1943.)

1708 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 8017

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UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., TUESDAY, DECEMBER 14, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and



Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1713 Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (Resumed)

Justice STEPHENS. Mr. Johnston, did you have a satisfactory evening with the exhibits?

Mr. JOHNSTON. Yes, if the Court please, I did. I went through those. I had Judge Garrett's set, and I have examined all that are in that bunch.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Mr. Brown, I would like to take you back to your letter of March 23, 1928, Exhibit No. 214, and call your attention to the next to the last paragraph on the second page.

Justice STEPHENS. What is the number of this exhibit?

Mr. STEFFEN. Exhibit 214.

By Mr. STEFFEN.

Q. I want to ask you one or two questions concerning how gypsum board was priced to the trade —

Justice JACKSON (interposing). Which paragraph did you call attention to?

Mr. STEFFEN. The next to the last paragraph on the second page.

Justice JACKSON. The last one?

1715 Mr. STEFFEN. The next to the last.

By Mr. STEFFEN.

Q. My question is—how was gypsum board sold to the trade, or how was it priced to the trade during 1927, 1928 and 1929. What I am getting at is this: Did you sell on a delivered price or an f. o. b. mill price?

A. I think we sold on a delivered price.

Q. Would you say that was customary in the gypsum industry?

A. I don't know, at that period.

Q. But your recollection, you say, is that you did sell on a delivered price?

A. That is my memory.

Q. That your company did?

A. Yes.

Q. Do you know whether there was any custom in the industry during that period—

A. (Interposing.) I don't.

Q. (Continuing.) To sell either on a delivered or an f. o. b. mill price?

A. I don't, sir.

Q. When you say you sold on a delivered price, what does that mean?

A. The mill price plus freight.

Q. And the freight would be from what point?

1716 A. From the plant producing the material.

Q. For example, if you were selling from your Acme plant in Texas, where would the freight be calculated from?

A. It would be calculated from Acme to destination, that is my memory.

Q. And when you took over Beaver, I think you testified you acquired a North Holston, Virginia, plant; is that correct?

A. Yes, sir.

Q. And if you were selling from North Holston, you would calculate your freight from North Holston to point of destination, is that your testimony?

A. That is my memory.

Q. And the same thing would be true, for example, from your Akron, New York, plant?

A. Yes, sir.

Q. Now you testified, I think, that the Certain-teed Products Corporation sold its other products, asphalt shingles and things of that character, to dealers and also through distributors, is that right?

A. Yes.

Q. Will you tell us what the business of those dealers and distributors consisted of?

A. Well, a dealer is usually classified as a concern selling at retail to consumers.

1717 Q. And what lines would your dealers generally carry?

A. Almost every kind.

Q. Well, will you specify them?

A. Such as lumber yards, hardware stores, general stores.

Q. Would that include masons' supplies, or plasterboard and plaster?

A. Lumber dealers would handle that type of product.

Q. And among your Certain-teed dealers were lumber dealers, is that correct?

A. Yes, sir.

Q. And did your company, to your knowledge, continue selling your asphalt shingles and other products to distributors, granting them a commission, as you recite here in the second page of Exhibit No. 214 in the next to the last paragraph?

A. Yes, sir.

Q. And your testimony, I think, yesterday was that you did not recall that your company sold gypsum-board to distributors on a commission basis?

A. That is right.

Q. Was that testimony having to do with the period after 1929 or before 1929?

A. Both, is my memory.

Q. Are you clearer on one period than you are on the other?

1718 A. No, sir.

Q. Could you say what the situation was when you left the company in 1937, as to whether you sold gypsum board to distributors on a commission basis?

A. To my memory, we did not at that time.

Q. You are pretty clear on that?

A. Yes, sir.

Q. Are you equally clear on the period prior to 1929?

A. I am not positive, but I don't think we ever did.

Q. That is your best recollection at the moment?

A. Yes.

Q. To refresh your recollection, yesterday you identified a letter from Mr. Avery to Mr. Brown under date of May 29, Government's Exhibit No. 224, and also Government's Exhibit No. 225, which was a letter by Mr. George M. Brown addressed to Mr. Avery, under date of June 4, 1929. I now want to show you Government's Exhibit No. 226, which relates to the same matters, and purports to be a memorandum from Mr. George M. Brown under date of June 4, 1929. I will ask you to state whether you can identify that as a memorandum which you saw?

Justice STEPHENS. What is that number, Mrs. Gillette?

Mrs. GILLETTE. No. 226.

Mr. STEFFEN. It is Item X279, dated June 4, 1929.  
1719 It just precedes the letter of June 4, which was Exhibit 225.

By Mr. STEFFEN.

Q. I want to ask you some questions on it, if you have finished reading it, Mr. Brown.

A. I haven't quite finished yet.

Q. Thank you.

A. All right, the question?

Justice STEPHENS. Just a minute, let the Court finish reading it.

The WITNESS. Excuse me.

Justice STEPHENS. Go ahead.

By Mr. STEFFEN.

Q. I would ask you, Mr. Brown, whether you are familiar with the writing at the top of the memorandum, the word "Whittemore"?

A. I would say that was his writing.

Q. Is that Mr. Whittemore's writing, "Looks OK to me"?

A. "Looks OK to me" is Whittemore's writing.

Q. And the initials "AW" are also his?

A. Yes.

Q. Do you know who wrote "Whittemore", which is scratched out, at the top?

A. I think Mr. Brown wrote it.

Q. That would be Mr. George M. Brown?

A. Yes, sir.

1720 Q. Do you recall having seen this memorandum?

A. No, sir.

Mr. STEFFEN. We offer Government's Exhibit 226 in evidence.

I will point out to Your Honors that the Item No. X279 indicates that it was taken from the files of the Certain-  
teed Company. The initials "AW" are the initials of a Vice President of the company, who says that it looks OK to him. The writing "Whittemore" is identified as being George M. Brown's writing. That is, he addressed it, apparently, to Mr. Whittemore, and Mr. Whittemore acknowledged it.

Mr. ADAMS. May I ask a question?

Justice STEPHENS. Yes.

Mr. ADAMS. Do you know who prepared this memorandum?

The WITNESS. No, sir.

Mr. ADAMS. I object on the ground that there is no proper foundation.

Justice STEPHENS. The objection is overruled. We think it has been sufficiently identified. It may be admitted in

evidence, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 226, was received in evidence.)

By Mr. STEFFEN.

Q. Mr. Brown, you have read this memorandum. It has to do with Bundling License and a proposed  
1721 license under the Bubble Plan.

Were you familiar with either of those matters at or after this time, in 1929?

A. I was familiar with them during that period. I can't say whether it was before or after.

Q. That is, you don't know whether it was before or after June 4, 1929?

A. I can't say whether it was before or after.

Q. But on or about June 4, 1929, you were familiar with the matter?

A. Yes, sir.

Q. Do you recall whether your company took out a license covering the so-called Bubble Plan?

A. It eventually did.

Q. Do you know the date, roughly?

A. I don't remember the date.

Q. Do you know who signed the contract?

A. I think Mr. Brown did, Mr. George Brown.

Q. Who else, for your company, would you know?

A. I wouldn't know who the co-signer was.

Q. I would like to show you, just for the purposes of refreshing your recollection on dates, the agreement which you said was eventually signed by your company, and ask  
1722 you to examine it so that we can get the period——

Justice STEPHENS (interposing). Is there any dispute about that date?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Let it be stipulated. It will save time.

Mr. BROMLEY. I am not clear whether you are talking about the bubble license or the bundling license.

Mr. STEFFEN. The bubble license.

Mr. BROMLEY. I will stipulate that it was ——

Mr. STEFFEN (interposing). October 15, 1929.

Mr. BROMLEY (continuing). Executed on October 15, 1929.

Justice STEPHENS. Thank you, gentlemen.



Mr. STEFFEN. Do you stipulate that it was signed on that date, or signed as of that date?

Mr. BROMLEY. I thought it was executed on that date.

Mr. STEFFEN. For my present purposes, October 15, 1929, establishes the date.

By Mr. STEFFEN.

Q. Would that be a probable or possible date, according to your recollection, Mr. Brown, October 15, 1929?

A. Well, I have no memory on the date. I assume so, it is during that period.

Q. Do you recall whether you were present when that October 15, 1929, agreement was signed?

1723 A. I don't think I was.

Q. Now we will have some questions concerning the period between June 4, 1929, or thereabouts, and October 15, 1929.

I think you have testified that you were in Chicago at some time during that period?

A. Yes.

Q. Could you tell the Court how many times, roughly?

A. No, sir. It might have been a couple of times.

Q. Well, give us your best recollection?

A. Two or three is my best memory.

Q. Two or three times?

A. Yes, sir.

Q. Can you give us some idea of the circumstances under which you went out in the first case, to the first meeting?

A. No, I can't specify any particular meeting, as to details.

Q. I don't ask you at the moment as to the meeting. I want to know what your instructions were, or what your conversation with Mr. Brown, or whoever you talked with, may have been, when you went out to Chicago to the first meeting?

A. I don't know.

Q. Now, Mr. Brown, did you just put your hat on and walk out to Chicago?

1724 Mr. ADAMS. I object to that, Your Honor. The witness has testified honestly that he does not recall. This is not a proper way to probe his recollection. If counsel has something with which he can refresh his recollection, I think he should do so, and not insinuate, as he apparently is doing, that the witness is not telling the truth.

Justice STEPHENS. Well, of course, Government counsel

can't cross-examine his own witness, but the Court interpreted that more as a pleasantry than otherwise.

Mr. STEFFEN. It was.

Mr. ADAMS. I will take it that it was, Your Honor, and I will be happy to accept it as such.

By Mr. STEFFEN.

Q. I want you, Mr. Brown, to consider very carefully what your instructions were, and what your conversation, if any, was, before you went out to Chicago?

A. I couldn't possibly remember.

Q. Now can you tell us what your duties were to be out there?

A. I don't know what I was going on, at the meeting that you are referring to.

Q. To any meeting at all.

A. I could have gone to a gypsum meeting, an industry meeting.

Q. I am asking you with regard to the bubble license and the bundling license negotiations.

1725 A. That is the first I understood that, sir.

Q. I am sorry.

A. The only instructions I had were to go out there and listen for Mr. Brown, and report back to him.

Q. You speak of Mr. George M. Brown?

A. Yes, sir.

Q. And did you talk with Mr. Whittemore before you went out?

A. I don't recall any conversation with Mr. Whittemore.

Q. Did Mr. George M. Brown outline to you what his ideas were concerning the negotiations?

A. I don't remember any such outline.

Q. Will you tell the Court in detail, then, just what you understood your instructions were?

Mr. ADAMS. I respectfully object to that. I think he should state what the conversation was, and I think it should be placed with reasonable certainty, so that we can examine him on it.

Mr. STEFFEN. Your Honor, on that objection that Mr. Adams has been continually making, if the witness will answer in general we will get down to the specific and give them a full opportunity to cross-examine. I would like to ask, as a preliminary matter, what instructions he received from Mr. Brown.

1726 Justice STEPHENS. The objection is overruled.

The WITNESS. I don't see how I can elaborate on what I have just said.

By Mr. STEFFEN.

Q. Let me ask you this: Did you look at the files before you went out?

A. I don't remember that.

Q. Did you take any papers out with you?

A. If any, I don't recall them.

Q. Can you recall the first meeting you had out there, and the place of the meeting? I don't ask for the time, at the moment.

A. I can't remember the place, I think it was some hotel.

Q. But you do remember that it was probably at some hotel?

A. That is my memory, yes.

Q. And I would like now to ask you who was present? This was the first occasion on which you were out to negotiate concerning the bubble license agreement and the bundling license agreement, and to report back, as you said, to Mr. George M. Brown.

A. I can't testify who was present. The United States Gypsum Company was present.

1727 Q. Take it slowly and tell us in detail, I want you to remember as carefully as you can. One was the U. S. Gypsum Company. Tell us who was present for the U. S. Gypsum Company?

A. I think Mr. Avery was there.

Q. Mr. Sewell Avery?

A. Yes.

Q. Who else?

A. Mr. MacLeish, as I remember.

Q. Well, who else was present?

A. Mr. Henning might have been present.

Q. He was from what company?

A. The U. S. Gypsum Company.

Q. Who else was present?

A. I can't testify positively.

Q. Do you know Mr. Knode?

A. Yes, I know Mr. Knode.

Q. Could you say whether he was present at this first meeting?

A. I couldn't say for sure.

Q. Was there a representative from the Ebsary Gypsum Company there?

A. I can't remember that.



Q. Can you remember that there was no representative of the Ebsary Gypsum Company there?

1728 A. No, sir.

Q. Did you know Mr. Ebsary?

A. Yes, sir.

Q. Mr. George Lenci?

A. Yes, sir.

Q. Do you know who their counsel was?

A. I think it was a Mr. Rippey, or something like that.

Q. Do you recall his having been present at this meeting?

A. I think they were, but I am not positive.

Q. What we want is your recollection. We realize this was back in 1929. Give us your best recollection. You think that Judge Rippey was there, but you are not positive?

A. No, sir.

Q. Would you say the same with regard to Mr. Ebsary or Mr. Lenci?

A. I think Mr. Ebsary was there. I have no memory of Mr. Lenci at all.

Q. Now who, if anyone, was there from National?

A. I don't remember that.

Q. Did you know Mr. Baker?

A. Yes, sir.

Q. Was he there, perhaps?

A. He might have been.

Q. Did you know Mr. Finck?

1729 A. Yes, sir.

Q. Was he there?

A. He possibly was, if Mr. Baker was there.

Justice STEPHENS. Are you remembering, or are you telling what you think was probable?

The WITNESS. I am saying what is probable, Your Honor. I can't remember.

Justice STEPHENS. You are being asked for your recollection.

Mr. BROMLEY. I move to strike out both the answers then, about Finck and Baker.

Mr. STEFFEN. We want, Mr. Brown, not to have you give us the probabilities, but recognizing that a long period of time has elapsed, we are wanting you to give us nonetheless your best recollection at the moment.

Justice STEPHENS. The answers may go out.

Mr. BROMLEY. May the answers with respect to Ebsary, Lenci, and Rippey likewise be stricken?

Justice STEPHENS. They may be stricken.

Please understand, Mr. Brown, that the Court doesn't expect the impossible of you. If you can't remember, just say so. Don't speculate or give your reasoning as to who might have been there. Counsel can argue that to the Court, you see. All we want is your recollection.

The WITNESS. Yes, sir.

1730 Justice STEPHENS. If you don't have any recollection, frankly say so.

By Mr. STEFFEN.

Q. I would like to reask the question with regard to Mr. Ebsary and ask what your recollection is as to whether either Mr. Ebsary or Judge Rippey was present? I want your recollection, not the probability.

A. I don't know.

Q. Do you recall them having been present at some one or more meetings at which you were present?

A. I recall their having been present at some meeting.

Q. And do you recall Mr. Baker and Mr. Finck as having been present at some one or more meetings in Chicago during this period, at which the bubble license agreement was under consideration?

A. They attended some meetings I attended.

Q. Now was there a representative of the Universal Gypsum Company present at any of these meetings you attended?

A. My answer would be the same as in the other cases, I don't know.

Q. Well, in the preceding case you said that Mr. Baker and Mr. Finck were present at one or more of the meetings. Can you say the same with regard to any representative of Universal?

A. Yes, they attended some meetings.

1731 Q. Who do you have in mind?

A. Mr. Holland.

Q. Mr. Eugene Holland?

A. Yes.

Q. Was there anyone there from the American Gypsum Company, that you remember?

A. No, sir.

Q. Was there anyone there from the Kelly Plasterboard Company?

A. I don't remember anyone.

Q. Do you know Mr. Stephen Kelly?

A. I have just met him, that is all.

Q. How about the Niagara Gypsum Company, were they represented at any one of these meetings at which you were present?

A. I don't remember.

Q. Do you know Mr. Reeb of Niagara?

A. I have met him.

Q. Was he present at any one of these meetings, that you remember?

A. I don't remember him.

Q. How about the Atlantic Gypsum Company, did you know Mr. Fuller?

A. Yes, sir.

Q. Was he present at any one of these meetings, as you remember?

1732 A. He attended some of the meetings.

Q. Did you know Mr. Neale?

A. Yes, sir.

Q. Was he present at one or more of these meetings at which you were present, in the summer of 1929?

A. I don't know about Mr. Neale.

Q. You don't recall?

A. No.

Q. Do you know who Mr. Neale was?

A. I think he was their Sales Manager.

Q. That is the Atlantic Gypsum Company's Sales Manager?

A. Yes, sir.

Q. Was there anyone out there at the first meeting, that you recall, from Certain-teed, other than yourself?

A. I think I was the only representative.

Q. And at subsequent meetings, do you recall any other person from Certain-teed having been present?

A. I don't recall anyone at the meetings I attended.

Q. I now show you, Mr. Brown, Government's Exhibit No. 227, which purports to be a memorandum, or rather an inter-office communication between Mr. Whittemore and Mr. Van Hagan under date of June 11, 1929, to which is attached a memorandum dated June 6, 1929, and I want to ask you to read it first, and then I will have some questions.

1733 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. I want to call your attention, Mr. Brown, to the initials, "C. O. B.", up at the top of Government's Exhibit

No. 227. Are those your initials? They are right at the top of the first page.

A. Yes. It was almost rubbed out, and I couldn't see it.

Q. Could you say who wrote them?

A. Mr. Whittemore, I would say.

Q. And what does the scratch through them signify?

A. It shows that I saw it.

Q. Is this a usual form of interoffice communication?

I am asking as to the form.

A. You mean Mr. Whittemore's letter to Mr. Van Hagan?

Q. Yes.

A. Yes, sir.

Q. How do you describe it?

A. An interoffice letter.

Q. Letter or communication?

A. Yes, sir.

Q. Is that the usual form?

A. Yes.

Q. And I think you have testified as to who Mr. Van Hagan is, but will you state it again, please?

1734 A. He was manager of Gypsum Production.

Q. And Mr. Whittemore was senior Vice President?

A. Yes.

Mr. STEFFEN. We offer Government's Exhibit No. 227 in evidence.

Justice JACKSON. That includes the attached memorandum?

Mr. STEFFEN. Including the attached memorandum.

Mr. ADAMS. May I ask a question?

Justice STEPHENS. Yes.

By Mr. ADAMS.

Q. Mr. Brown, was the memorandum attached to this memorandum of Whittemore's when you saw it back in 1929?

A. I don't remember that.

Q. As far as you are concerned, the first paper indicates that you saw that, because your initials are on it and are scratched out; is that correct?

A. Yes, sir.

Q. You now have no idea whether the second 2 pages were attached then or were not, is that correct?

A. I couldn't swear that they were.



Mr. STEFFEN. Could you swear that they weren't, Mr. Brown?

The WITNESS. No, sir.

Mr. STEFFEN. I want to call Your Honor's attention to the fact that the item numbers indicate—X-273 and X-274—that they were attached, and one follows the 1735 other in sequence. I also want you to note that the words "We are attaching copy of memorandum made by C. O. Brown", appear right in the first paragraph of the memorandum; and when Mr. Brown struck out the initials "C. O. B.," in indicates that he had seen that; and the probabilities are, although his recollection is now vague, that he saw the attached memorandum.

Mr. ADAMS. And may I make the further statement, Your Honor—if Your Honor cares to examine the original exhibit, you will see that there are paper clips that go through here, and you will also see that at some time there were other paper clips which have been removed, and some other document may or may not have been attached to this document, I don't know. The witness says he doesn't know whether this was the paper that was attached or whether it was not attached. I would like, if I may be permitted to, to hand this up to Your Honor so you can see exactly what I am talking about.

Justice STEPHENS. Hand it up.

(Document handed to the Court.)

Mr. STEFFEN. I would like to ask a question in that connection.

Did you or your law office, or the Certain-teed people, photostat these copies that are marked with "Item No.," before they were turned over under subpoena?

Mr. ADAMS. We did a lot of them.

1736 Mr. STEFFEN. Could you say how many?

Justice STEPHENS. I didn't hear that.

Mr. STEFFEN. Mr. Adams has just stated that on the Item No. exhibits, they photostated a large number of them before they were turned over to the Government under subpoena, and I may call Your Honors' attention to the fact that in photostating, of course, it might be possible to disengage the clips. But the Item Numbers show a direct sequence.

Mr. ADAMS. I would like to point out, Your Honor, two things: First, I would like to point out that this, from our view, may or may not have been the memorandum attached originally. We have no way of knowing. Secondly, this memorandum is supposed to refer to a meeting. The memo-



random doesn't say anything about a meeting. It may be that this is an entirely different memorandum.

Now I wish to suggest, in connection with that, that Mr. Brown is extremely vague, necessarily, as to what took place at these meetings, or when they took place, or who was present at them. Now we can't say honestly that this is a memorandum about this meeting. We can't say that it has been identified by him as a memorandum that he made about the meeting.

Justice GARRETT. I don't think he has been asked about that, has he?

Mr. STEFFEN. He hasn't been asked at all. And I want to point out the inaccuracy of Mr. Adams' present  
1737 remarks.

Justice STEPHENS. You needn't reply. We have to deal with probabilities, Mr. Adams. It may be, it is possible, that this memorandum wasn't attached to the letter, but we think the probabilities are sufficiently shown to warrant the Court concluding that the two items are identified.

The objection is overruled, and the exhibit is received.

(The document referred to, marked as Government's Exhibit No. 227, was received in evidence.)

Mr. STEFFEN. May I add one thought? The first sentence there says this is a "copy of memorandum made by Mr. C. O. Brown after the meeting at Chicago." It doesn't purport to be about the meeting necessarily, it doesn't say that it is.

Mr. BROMLEY. May the record show we make the usual objections?

Justice STEPHENS. Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. Would it be convenient to take a short recess at this time?

Justice STEPHENS. Yes, we may have a recess now of five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

1738 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. I would like, Mr. Brown, to have you look at Government's Exhibit No. 227, please, and particularly the first paragraph of the memorandum dated June 6, 1929. Could you tell of the situation with regard to the bubble

patent or patents at the time that this memorandum was written?

A. It was stated in this memorandum —

Q. (Interposing.) I would like your recollection, if you have one.

A. Yes, sir. My recollection is exactly the same as this, about the Rice situation, and so forth.

Q. Now will you refer to the next to the last paragraph on the first page of that memorandum, beginning, "Some things are now in the license that were brought up", and so on, and state what that situation was?

A. I don't know what the reference is to "Some things are now in the license that were brought up." The USG did say they would extend any improvements that were later developed.

Q. Was there any discussion that you remember concerning whether USG was making bubble board at any of its plants at this time?

A. It is my memory that they were.

Q. Had you seen bubble board out on the market in your capacity as sales manager?

1739 A. I don't say I had seen any of it, but I had heard of it, due to the fact of its being a lighter-weight board.

Q. Was it being advertised at this time?

A. It was being talked by word-of-mouth at least.

Q. At about this time, June 6?

A. Yes, sir.

Q. I want to call your attention to the date, June 26, appearing near the end of the fourth paragraph. Do you recall whether there was a meeting held later, on or about June 26?

A. I don't remember.

Q. I think you testified that there were meetings at subsequent times?

A. Yes, sir, but the dates I am not positive of.

Q. I now show you Government's Exhibit No. 228—I am skipping one exhibit—which purports to be a memorandum, dated July 3, 1929, with your name, C. O. Brown, vice president, appearing at the end, typewritten: "I would like to ask you to examine that carefully and then I will ask you some questions."

Now I would like to ask you, Mr. Brown, if you can identify the initials at the top of Government's Exhibit No. 228.

A. Yes, sir, those are Mr. George M. Brown's initials.

Q. Can you say whether that is his handwriting, "O. K. to sign up"?

A. Yes, sir.

1740 Q. And the initials on the left margin are whose?

A. Mr. A. Whittemore's.

Q. Now turn the page and state, if you know, who made the interpolations in the writing?

A. I made them.

Q. Is that your handwriting?

A. Yes, sir.

Q. Is this your memorandum, this memorandum of July 3, 1929?

A. Yes, sir.

Mr. STEFFEN. We now offer Government's Exhibit No. 228 which has been beautifully identified, and in that we include the attached memorandum by Mr. Chaffee, which is identified in two ways.

It is identified by the opening sentence in the memorandum of July 3d where it states, "Attached is letter from our attorney, Mr. S. W. Chaffee, outlining certain legal reasons why it might not be desirable to sign these License Agreements." His memorandum outlines certain legal reasons why it might not be desirable.

And the second matter of identification Mr. Adams put on himself, or his firm did, and that is "Item No. X-270" which appears on the memorandum of July 3d. It also appears exactly the same on the Chaffee memorandum, Item No. X-270. You will also note that there is a little number on top of each page, 1, 2, 3, 4 and 5. Those  
1741 numbers are usually put on when they are sent out for photostating, and Mr. Adams told the Court that they had a large number of these matters photostated for their own purposes before they were submitted under subpoena.

Mr. ADAMS. I object to the inclusion as part of this exhibit of Mr. Chaffee's letter to Mr. Brown. It was stated yesterday that Mr. Chaffee was counsel for the company. The memorandum of Mr. Brown, dated July 3d, states that there is attached a letter of Mr. Chaffee outlining certain legal reasons why they should not enter into the license agreement, and the memorandum itself, a most casual inspection will show, is a product of a lawyer's careful study. It seems to us that it is clearly a privileged communication.

There is no doubt that Mr. Chaffee was their lawyer, there is no doubt that this communication was something which dealt with a legal matter between attorney and

client. The cases are clear that a communication in writing, as well as an oral communication, from attorney to client, comes within the privilege. It is not waived, and we assert it on behalf of the Certain-teed Products Corporation.

Justice STEPHENS. We have considered, since yesterday, the confidential-communications rule.

We stated yesterday that we were inclined to the view that the document which was being discussed yesterday came within that rule. We are inclined to revise 1742 our views with respect to that document, although that is moot now because the document was excluded on other grounds, as being not identified.

We think that the rule is that the burden is upon the person exercising the privilege to demonstrate to the court that the communication was probably confidential. We think, with respect to the item yesterday, that that probably was not shown to be confidential. But we are agreed that this one is. We think that this letter by the lawyer, which is attached to the exhibit, is clearly a confidential communication by a lawyer to his client on the subject of a proposed license agreement. We think that the memorandum itself is sufficiently identified —

Mr. ADAMS (interposing). I have raised no question about that, your Honor. My objection was to the communication from the lawyer.

Justice STEPHENS. The matter has been quite thoroughly argued already. Of course we will hear you further, Mr. Steffen, if you have any thoughts which you think we have not considered.

Mr. STEFFEN. I think there are two points that have not been quite adequately considered, which make this a little different, perhaps, than the matter we considered yesterday.

Justice STEPHENS. We think it is distinctly different, as we are presently advised.

1743 Mr. STEFFEN. I want to call your Honor's attention to one matter that has not been discussed.

I would first like to call your Honor's attention to the case of the United States versus Vehicular Parking, Ltd., which was decided December 3, 1943, by Judge Leahy, a District judge. We have copies of the opinion which we will supply to the Court.

That case raised a question on the matter of whether the particular information or data had been furnished by or to a lawyer in his professional capacity, or whether it had



been in his capacity as business adviser; and it would support your Honor's position as respects the memorandum that we had up yesterday.

There are also some statements in there concerning the admissibility of evidence which we will want to refer to later on under Rule 43-A of the Rules.

Now I want to call your attention to one item on this Chaffee memorandum. Clause 2 provides:

"Clause '3.', page 4, provides that the royalty shall be one per cent of the selling price"——

Justice STEPHENS (interposing). Which paragraph is that?

Mr. STEFFEN. That is the paragraph numbered (2) on the first page of the Chaffee memorandum. I don't need to read that into the record, but I want to call attention to the second paragraph of Paragraph (2); and then Paragraph (7) which covers the same point; and then to Paragraph (8) Clause 16, which makes the point concerning improvements.

Justice STEPHENS. Yes, we have noted that.

Mr. STEFFEN. And the final paragraph of Mr. Chaffee's memorandum in our opinion states that this agreement, if signed ——

Mr. ADAMS (interposing). I am reluctant to interrupt, but I respectfully suggest that counsel is now arguing to the Court the contents of a memorandum which we have argued, and which the Court has indicated, is a privileged communication.

If counsel sees anything in this memorandum which he says takes it out of the privilege, let him say so, without arguing this question as to what the memorandum contains, and what his interpretation and opinion may be of the contents of the memorandum.

Justice STEPHENS. The Court understands counsel to be in the process of arguing some point as to why it is not privileged.

Mr. STEFFEN. That is correct.

Mr. ADAMS. And also without reading it into the record.

Justice STEPHENS. It has not been read into the record. Counsel has taken pains not to read it into the record.

Mr. STEFFEN. My point is that the rule concerning privileged communications applies where a communication has been confided to an attorney in his professional capacity, where it is intended to be confidential, and thirdly, where it does not have to do with possible violations of a statute.



If an attorney recommends or suggests to his client  
 1745 that an action which the client might take would be  
 in violation of a statute, it is no longer privileged,  
 by all the authorities. We contend that his statement in  
 the final paragraph there points out the whole vice in an  
 anti-trust suit, and says that if you sign this you will be  
 stifling improvements in the industry, which is the very  
 essence of a monopoly—and on that basis we contend that  
 irrespective of any other argument, Mr. Chaffee's memo-  
 randum is admissible.

Justice STEPHENS. What do you say to that, Mr. Adams?

Mr. ADAMS. I will first say at the outset, that it is an  
 extraordinarily strained interpretation of a memorandum.

In the second place, I do not agree with counsel's state-  
 ment that anything which a lawyer may have to say to  
 his client with respect to a possible violation of the statute  
 is thereby not within the protection of the privilege. Were  
 that so there wouldn't be many lawyers that would be in  
 business.

What counsel is talking about is where a lawyer advises  
 with respect to the commission of a crime. I think the  
 cases are clear on that point. But if a man may think that  
 he has committed a crime, or may have violated a statute,  
 and he consults his lawyer about it, if his lawyer can be  
 called and made to testify concerning that, there is nothing  
 left to privilege.

I know the cases which counsel is referring to, I  
 think. They are the cases that came up more or  
 1746 less recently in connection with the wire-tapping  
 statutes.

In those cases the lawyers were a part of the conspiracy  
 and were counseling their clients with respect to the com-  
 mission of a crime. Of course the privilege doesn't apply  
 in those cases.

But if we are to take the rule to be where a client con-  
 sults his lawyer and the lawyer says, "If you do this, you  
 might possibly be violating X, Y or Z statutes", there is  
 nothing left to the privilege.

Mr. STEFFEN. I think the matter is treated, your Honor,  
 in Jones on Evidence, Fourth Edition, page 1360.

Justice STEPHENS. Is there anything in this case that  
 you especially wish us to look at in this connection?

Mr. STEFFEN. No, your Honor. That had to do with  
 the matter that we discussed yesterday.

Justice STEPHENS. We will read it and consider it later.

Do you wish to say anything more, Mr. Steffen?

Mr. STEFFEN. No, I think not.

Justice STEPHENS. We think the objection to the lawyer's communication should be sustained. The rule upon which you rely is well stated by Wigmore in his Code of Evidence, and is generally settled that, "The privilege does not cover a consultation seeking the aid of the attorney's legal skill to effect knowingly an unlawful act, in the nature (1) either of a future crime; (2) or of a future civil wrong involving moral turpitude".

1747 It seems to us that that does not cover this situation. The advice of counsel was against the act which you claim to be illegal.

Mr. STEFFEN. Well, it would seem to be an a fortiori proposition that if the counsel's advice was respectable, and against the commission of a crime, that that should no longer be privileged if the client violates that.

Mr. ADAMS. That is putting the cart before the horse.

Justice STEPHENS. The memorandum itself, showing what the client did, is not being excluded. That is to be admitted in evidence. There is no objection, as a matter of fact, to the memorandum, proposed Exhibit 228.

Let me be sure I have this correctly marked. This is the July 3, 1929, memorandum?

Mr. STEFFEN. That is right.

Justice STEPHENS. I didn't mark it when I first saw it.

Exhibit 228, so far as that portion of it is concerned which comprises the memorandum itself, as distinguished from the communication from the lawyer, Mr. S. W. Chaffee, is admitted in evidence, there being no objection to it, and the Court thinks it is properly identified.

Mr. BROMLEY. We make the usual objection, of course.

Justice STEPHENS. Yet, it is received subject to the reservation with respect to the declarations of 1748 alleged co-conspirators.

(The memorandum of July 3, 1928, marked as Government's Exhibit No. 228, was received in evidence.)

Justice STEPHENS. The advice of the lawyers seems to the Court clearly privileged and not within the exception to which you refer, Mr. Steffen. Indeed, if the device were in the contrary direction, even if it advised what was being done here, advised accepting a contract which the Government contends is illegal, we would still be confronted with the unique situation which comes up from time to time in the course of rulings on questions of evidence, where the

preliminary question of fact also involves the ultimate substantial question in the case, as to whether there is a violation of law; and there, of course, the Court is forced to make the preliminary determination of fact as it best can at the time, even though its ultimate ruling might be inconsistent on the question of the substantive wrong involved. We think that this is a clear case of a confidential communication. So we reject the memorandum of the lawyer.

Mr. ADAMS. May the memorandum be removed from the exhibit before the witness and returned to counsel for the Government?

1749 Justice STEPHENS. Yes, that may be done.

As a matter of fact, the Court directed Mrs. Gillette, the assistant to the court reporter, yesterday, informally, and intended to acquaint counsel with the direction, that where an exhibit has been offered and rejected, it should be taken and returned to whoever has offered it. Otherwise it lies before the witness and the witness continues to glance at it, and it may modify his testimony in a manner which would not be intentionally on his part but actually legally improper.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You will follow the instructions of the Court, Mrs. Gillette. Where an exhibit has been rejected it is to be taken from the witness stand and returned to counsel who offered it.

Mr. STEFFEN. We understand that this continues as an item under that number, for purposes of our records.

Justice STEPHENS. Oh, certainly, the record must contain the offered exhibit in order that, in the event that this case should be determined against the Government, you may take advantage of the adverse ruling if you see fit to do so, by urging it to be error. The Court is not ordering it out of the record in the legal sense of the term, but only off the witness box.

Mr. STEFFEN. We do not like to detach this, your Honor. Can we work out some system —

Justice STEPHENS (interposing). If you are not through with your examination on the memorandum itself,  
1750 you may represent it to the witness and the Court will instruct the witness to look at only that portion of it other than the lawyer's communication. I thought you were through with it, Mr. Steffen.

Mr. STEFFEN. The understanding is that you will not look at Mr. Chaffee's letter.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Now, Mr. Brown, this memorandum of July 3, 1929, Government's Exhibit No. 228, makes some references to bundling. Will you describe to the Court what bundling is? (Laughter.) I mean, as applied to the gypsum industry.

A. I don't know any other kind.

Justice STEPHENS. The Court will take judicial notice that counsel is not referring to the ancient New England custom. (Laughter.)

The WITNESS. Bundling, as referred to here, covers the method of binding a certain number of sheets of gypsum lath together for easy handling.

By Mr. STEFFEN.

Q. What was the method?

A. With a form of tape, as I remember it, that came over the edges.

Q. The long edge of the board? Take those two books and explain by the books on the witness box.

1751 A. The binding would come over like this (indicating), as I understand it.

Q. How many gypsum lath were put together in a bundle?

A. I don't remember, seven or eight, possibly, maybe more.

Q. Five or six, was it not?

A. I don't remember, I am just guessing. I said a certain number, in my original testimony.

Q. The paper would run along the long edges of the board, is that correct?

A. That is my memory.

Q. Was the discussion, as related here in your memorandum concerning the licensor's attitude in the event that someone should make a new form of bundling, correct?

Mr. ADAMS. I object to that.

Mr. STEFFEN. In substance and effect.

Justice STEPHENS. Read the question.

Mr. STEFFEN. I withdraw the question.

Justice STEPHENS. The exhibit speaks for itself.

Mr. STEFFEN. I think that is correct.

Justice STEPHENS. The objection is sustained.

By Mr. STEFFEN.

Q. You have read this memorandum of July 3d, Mr. Brown?



A. Yes, sir.

1752 Q. I want to take you to the second page, the first line. There you say, "Taking these things into consideration, plus other advantages", and so forth, and I would like to ask you what the "other advantages" are that you had in mind there.

A. There would be a stabilized market on gypsum lath.

Q. And by "stabilized" you mean what?

A. Price control.

Q. I now show you Government's Exhibit 229, which purports to be an interoffice communication between Mr. Chaffee and yourself under date of July 8, 1929, and ask if you recall having received that memorandum.

Justice STEPHENS. Where is that? We don't find that.

Mr. STEFFEN. That is immediately following.

Justice JACKSON. Immediately following is an agreement —

Justice STEPHENS (interposing). Immediately following is a very long supplemental license agreement, and following that is a memorandum of —

Mr. STEFFEN (interposing). Do you not have a short memorandum under date of July 8, 1929, bearing Item No. X-103?

Justice STEPHENS. I beg your pardon, I skipped that. It is a short three-paragraph memorandum?

Mr. STEFFEN. Yes.

Justice STEPHENS. Proceed, we now have it located.

By Mr. STEFFEN.

Q. I want to ask you, Mr. Brown, whether that is the usual form of interoffice letter used by Certain-  
1753 teed during this period.

A. Yes, sir.

Mr. ADAMS. Maybe we can save some time by saying that I don't object—I don't know about other counsel—to the identification of this document, but I renew my objection on the ground that it is a privileged communication.

Justice STEPHENS. Do you wish to be heard?

Mr. STEFFEN. I wish to say simply that this is just a statement by Mr. Chaffee, concerning what he reads in the contract. It doesn't seem to me to be anything in a professional capacity of the sort which is entitled to privilege.

I might say, in addition, that there has been no showing at all here as to how this matter was handed to Mr. Chaffee. I point out that he is writing on the usual form of the



Certain-teed Products Corporation for interoffice communication, and he evidently was functioning as a house attorney, not as a lawyer, when he answered this, and in such cases, he must come under the usual rule that any communication that he makes, even though it does have to do with a legal matter, would be simply a business communication.

Justice STEPHENS. Do you contend that what is commonly referred to in the profession as "house counsel" are not such lawyers as are entitled to be within the privileged-communication rule?

1754 Mr. STEFFEN. I do, your Honor.

Mr. ADAMS. As a matter of fact, Mr. Brown, Mr. Chaffee was on general retainer from your company, was he not?

The WITNESS. Yes, sir.

Mr. ADAMS. And he had other legal business, did he not.

The WITNESS. Yes, sir.

Mr. ADAMS. As a matter of fact, he was a member of a law firm, wasn't he?

The WITNESS. Yes, sir.

Mr. ADAMS. I want to say also, your Honor—in the first place, there doesn't seem to me to be any question but what this is a matter which is, on its face, a product of a lawyer's consideration of a legal matter for a client, and his interpretation of a legal document. I can't think of anything that could be more clearly a matter of professional attention. But I should also like to make the further point, if I may, that on this question of what is or is not privileged, Mr. Wigmore seems to hold —

Justice STEPHENS (interposing). We don't need to hear you further. All three members of the Court are clearly advised that this is privileged.

Mr. ADAMS. This point I have in mind I am sure I will have occasion to make later.

Justice STEPHENS. Very well. Objection sustained. The exhibit is rejected.

1755 Justice JACKSON. What number is that, Mr. Steffen.

Mr. STEFFEN. That is Exhibit 229.

By Mr. STEFFEN.

Q. I want to show you Government's Exhibit No. 230, which purports to be a contract between the Certain-teed Company and the United States Gypsum Company under date of July 3, 1929, and I would ask you to examine the

signatures, and then I will ask you some questions.

Do you identify the signatures, Mr. Brown?

A. Yes, sir.

Q. Whose are they?

A. Mr. Avery's for the United States Gypsum Company; Mr. C. O. Brown's for Certain-teed Products Corporation.

Q. That is your signature?

A. Yes, sir.

Q. I now call your attention to paragraph 2 of the agreement where there are some words underlined. Do you know who did that underlining?

A. I don't seem to see that. Is it on the first page?

Q. No, paragraph 2 on the second page.

A. Excuse me. No, sir, I do not know.

Q. Was that the clause referred to in your memorandum of July 3, under "bundling", the third paragraph, if you have that before you?

A. I haven't it before me, sir.

1756 Justice STEPHENS. Re-submit it to the witness.

(Government's Exhibit No. 228 was handed to the witness.)

Justice STEPHENS. Where is that asserted?

Mr. STEFFEN. In the third paragraph, under the heading of "bundling patent", on the first page of Exhibit 228.

The WITNESS. Yes sir, it refers to the same thing.

Justice STEPHENS. I don't quite understand that, Mr. Steffen.

Mr. STEFFEN. I am just asking him to connect that language with the third paragraph of his report, if that is what he had in mind.

Justice STEPHENS. What language in Exhibit 228 are you asking him to connect with the underlined material in Exhibit 230?

Mr. STEFFEN. The third paragraph, under the heading "bundling patent" on Exhibit 228, makes a reference to the matter which the witness has stated is covered in the second paragraph on the second page of Exhibit 230.

Justice STEPHENS. The third paragraph of that topic which has to do with bundling?

Mr. STEFFEN. Yes.

Justice STEPHENS. I see what you mean now.

By Mr. STEFFEN.

Q. Do you recall that a discussion, Mr. Brown, of  
1757 this paragraph of Exhibit 230, paragraph 2 of the

second page of Exhibit 230, was had in your meetings at Chicago?

A. No, sir.

Q. What was the position of your company, could you state that?

A. Well, the position of the company, as I recall it, was that we knew of no better method for bundling lath, and as a consequence decided to take it.

Q. Did you understand whether it required you to make bundling, or to do bundling, according to this patent?

A. I don't understand the question.

Mr. BROMLEY. I object to that on the ground that the license speaks for itself, if the Court please.

Mr. STEFFEN. I am not trying to construe the license; I want to get the understanding of the witness.

Mr. BROMLEY. That is immaterial.

Mr. STEFFEN. It is highly material in showing what the attitude of mind of the Certain-teed Products Company was in entering into this agreement. We are not attempting to construe this agreement, but I want to know why they entered into the agreement.

Justice STEPHENS. You may probe the witness' recollection as to discussions which took place, but the objection to the question, as phrased, is sustained.

By Mr. STEFFEN.

1758 Q. Well, was there any discussion that you recall concerning the licensor's position that you could only bundle according to the licensor's patent, and in no other way?

A. I don't remember any.

Q. Was your position favorable to that, would you say?

Mr. ADAMS. May I have that question, please?

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Mr. ADAMS. I object to it, as to form —

Justice STEPHENS (interposing). Well, that is perhaps pretty close to the borderline, Mr. Adams. Still, this man was an officer of the company. The intentions and motives of the company, in entering into this agreement, have some relevance and possible weight. I think that question is not objectionable. Objection overruled.

The WITNESS. I think I answered that a minute ago. We couldn't get the license with the clause excluded, we wanted

to bundle our lath, and we knew of no better or more economical way to do it.

By Mr. STEFFEN.

Q. You use the words in your letter here, "and in the interest of harmony in the industry". Was that a consideration?

A. No, sir, I don't think so.

Q. There in that third paragraph.

1759 A. I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent.

Q. Thank you.

I notice in the fourth paragraph, Mr. Brown, that you mention that "it was signed by all producers of gypsum lath and gypsum wallboard except the Atlantic Gypsum Company". Was that a matter of importance to Certain-  
teed in determining what its position should be?

A. I don't remember about that.

Q. Do you recall whether all of the producers ultimately took out a license under the bundling patent?

A. Will you state that question again?

Q. Do you recall whether Atlantic and all the producers ultimately —

A. (Interposing.) I don't know.

Q. I think the documents will show that.

Mr. STEFFEN, Your Honor, we have reached the end of this exhibit and our next one is a long one.

Justice STEPHENS. We will take the noon recess at this time. How much longer will this witness be on the stand on direct examination, have you any idea?

Mr. STEFFEN. At least another day, I think, counting the cross-examination.

Justice STEPHENS. Announce the recess.

1760 (Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1761

#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. You may proceed.

Thereupon CLAUDE OLIVER BROWN, the witness on the stand at the time of recess, resumed his testimony as follows:



## DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. May it please the Court.

By Mr. STEFFEN.

Q. Mr. Brown, at the adjournment we were talking about your memorandum of July 3, 1929, in which Mr. Whittemore and Mr. George M. Brown approved generally the signing of a license agreement under the bubble patent and a license under the bundling patent.

Do you recall any subsequent meetings after July 3, in Chicago, concerning either of those two license agreements?

A. There were some later meetings, but I don't recall the dates.

Mr. STEFFEN. At this time, Your Honor, I should like to read into the transcript the U. S. Gypsum Company's Answers to our interrogatories, which are offered as admissions, concerning a meeting of July 25, 1929, in Chicago, and a meeting of August 6, 1929, in Chicago; and I will read them as follows:

1762 "34. (b) July 25, 1929—Chicago. A meeting was held at which some or all of the following attended: Sewell L. Avery"—President of United States Gypsum Company—"and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc. and/or its attorney, Harlan W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company; and Eugene Holland, co-receiver of Universal Gypsum & Lime Company.

"(c) August 6, 1929—Chicago. A meeting was held at which some or all of the following attended: Sewell L. Avery"—President of United States Gypsum Company—"and its attorney, John E. MacLeish; W. P. Fuller, President of Atlantic Gypsum Products, Inc., and its attorney, H. M. Channing; C. O. Brown, Vice-President of Certain-teed Products Corporation; Frederick G. Ebsary, President and/or George N. Lenci, Vice-President of Ebsary Gypsum Company, Inc. and/or its attorney, Harlan W. Rippey; Melvin H. Baker, President of National Gypsum Company and its attorney, Elmer E. Finck; M. E. Reeb, President of Niagara Gypsum Company, and Eugene Holland, co-receiver of Universal Gypsum & Lime Company."



1763

By Mr. STEFFEN.

Q. Does that refresh your recollection, Mr. Brown, as to whether you attended meetings on those two dates, July 25 and August 6?

A. I don't remember the dates, but I attended those meetings.

Q. I now show you Government's Exhibit No. 231, which purports to be a memorandum from C. O. Brown, addressed to George M. Brown, under date of August 9, 1929, and attaching a memorandum of yours under date of July 30, 1929, and ask you to read them carefully and I will then ask you some questions concerning them.

Justice STEPHENS. You may proceed.

By Mr. STEFFEN.

Q. I want to call your attention —

Justice STEPHENS. (interposing). Do you want to offer 230, so as to get the record clear on that exhibit?

Mr. STEFFEN. Yes, I will offer Exhibit 230 at this time.

Justice STEPHENS. Is there any objection to Exhibit 230, the license agreement?

Mr. BROMLEY. No.

Justice STEPHENS. Received in evidence.

(The document referred to, marked as Government's Exhibit No. 230, was received in evidence.)

1764

By Mr. STEFFEN.

Q. Now, Mr. Brown, will you direct your attention to the bottom of the first page of Exhibit 231, and you will note the interlineation there?

A. Note which?

Q. Do you know in whose handwriting that interlineation is?

A. My handwriting.

Q. Over on the second page of Exhibit 231, do you know in whose handwriting the words "by" and "to" are?

A. Yes, sir, in mine.

Q. I also refer you to the 2nd page of the memorandum of July 30, and the words "Mr. Holland"—is that your interlineation?

A. Where was that, please?

Q. On page 2 of the July 30th memorandum.

A. Yes, sir.

Q. And was this a report that you were making to Mr. Brown?

A. Yes, sir.

Q. And the report of July 30 was referred to there in the first paragraph of your memorandum of August 9. That second sentence refers to the combined royalty under USG patents and Universal patents totalling 5%.

Justice STEPHENS. I don't see that.

1766 Mr. STEFFEN. If you will look at the first paragraph of the August 9 memorandum, the second sentence.

Justice STEPHENS. Yes.

Mr. STEFFEN. "In order that you may have a full picture, I am attaching" —

Justice STEPHENS (interposing). Oh, yes.

Mr. STEFFEN. We now offer in evidence Government's Exhibit No. 231.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 231, was received in evidence.)

By Mr. STEFFEN.

Q. I want to ask you one or two questions, Mr. Brown, concerning your memorandum of August 9, 1929. On the second page of that memorandum you make the statement that all of the independent gypsum companies are willing to sign. Who did you mean by "independent gypsum companies", if you have found the place?

A. It is my memory that I meant board manufacturers.

Q. And why did you speak of "independent gypsum companies"?

1766 A. It is not a clear term, but that is the best answer I can give on it.

Q. Could you name them?

A. That would be National, Universal, Ebsary —

Q. (Interposing.) Kelly, Atlantic?

A. Atlantic. I don't recall Kelly.

Q. Now was it a matter of importance to your company that all of the gypsum companies were willing to sign on this basis?

A. We preferred to see as many as possible sign.

Q. You were an officer of the company and had been talking with Mr. Brown. Would you say whether you would have been willing to have taken out a license if a substantial number had refused to sign?

Mr. ADAMS. I object to that as to form, and also as not having the time and place of the conversation fixed with some certainty.

Justice STEPHENS. I didn't hear the last part of your objection.

Mr. ADAMS. I am sorry. Also, the time and place of the conversation, if any took place, should be fixed with some certainty.

Justice STEPHENS. The Court thinks the objection is not well taken. Overruled.

1767 Mr. STEFFEN. Will you read the question, please, Mr. Grover?

(The question was read by the reporter.)

Mr. BROMLEY. I object to that on the ground that it is speculative, and therefore incompetent.

Mr. STEFFEN. Your Honor, I want Mr. Brown, who was an officer, who had been negotiating, to state what the company's position was, as he understood it.

Justice STEPHENS. You needn't go further. We think Mr. Bromley, that the question is not speculative. Of course, if the witness doesn't know, he understands that he is not to answer. But one of the charges in the complaint here is that the license agreements were entered into as a means of violating the law and as a cloak for violating the law. The Government is entitled to try to prove that. This witness was an officer of the company and was present at these conferences. If he knows what the motive of the company was as a result of being an officer and being at these conferences, we think the Government is entitled to bring that out.

Objection overruled.

Mr. STEFFEN. Read the question again, please.

(The pending question was reread by the reporter.)

The WITNESS. This report was made to Mr. Brown, the President, who had the final say. Anything I said would be my opinion, as I see it.

1768 By Mr. STEFFEN.

Q. We want your position as an officer of the company, Mr. Brown, and you are authorized to answer.

Justice STEPHENS. We are not asking for your present opinion as to whether the company would have done it. We are asking, or counsel is asking, and may properly ask only, we think, for the position you were then taking as an officer of the company. If you weren't taking any then, say so.

Mr. STEFFEN. Or that you would have taken on the assumption taken, that is, if a substantial number of your competitors had stayed out of the agreement.

The WITNESS. This report says that they were in, Your Honor, and that is what confuses me. It is something that has already happened.

By Mr. STEFFEN.

Q. Had they signed the agreements at this time, do you know?

A. I can't answer that. I don't think so.

Q. All your letter says is that they were willing to sign.

A. Yes.

Q. And I am asking you for your position as to whether your company would have been willing to sign at this time if a substantial number of the independent companies had refused to sign?

1769 A. They might not have signed.

Q. Now earlier in your testimony, yesterday, I think, you said that you favored the company taking out a license under the closed-edge patent. Was that your testimony?

A. Yes, sir.

Q. And I think you next said that one reason for favoring it was that you could sell a closed-edge board more readily than an open-edge board. Is that a correct statement?

A. Yes, sir.

Q. Could you tell us whether you would have favored, as you testified, taking out the closed-edge patent license in April, 1928, which is the period concerning which you testified, if a substantial number of your competitors at that time had been unwilling to take out a license under the closed-edge patent?

Mr. BROMLEY. The same objection.

Mr. ADAMS. Moreover, I think it assumes facts that aren't in evidence. I don't think he testified to that.

Justice STEPHENS. I can't hear you, Mr. Adams.

Mr. ADAMS. I am sorry, Your Honor.

I think it assumes facts not in evidence, and I don't think that is the way he testified.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. I don't have a clear recollection of whether the witness testified to that or not. If



1770 a serious point is made of it, we will have to look up the record.

Mr. STEFFEN. I will lay this much groundwork, Your Honor. He just stated that he testified that he was in favor of the closed-edge board in March and April, 1928. That appears in the record, and I think there is no question as to that. All I am asking him is whether he would have favored taking out the license if his competitors were unwilling at that time to take out a license.

Justice STEPHENS. But you have added to the question—and that is the subject of Mr. Adams' objection—a statement that he had already testified that a large number of them were unwilling to take it out.

Mr. STEFFEN. No, that doesn't appear in the question, or at least I didn't intend it to.

Justice STEPHENS. Maybe I misunderstood the question when it was read. If all that you are asking the witness now is whether or not, in effect, one of the conditions upon which his company desired to enter the license agreement, without which it would not have entered the license agreement, was that the others should also take it, you are entitled to go into that. I assume that is what you had in mind.

Mr. STEFFEN. Yes.

Justice STEPHENS. Objection overruled.

1771 The WITNESS. Conditions under the original license were very different than this. We were facing lawsuits, and I naturally favored getting out of that.

By Mr. STEFFEN.

Q. What lawsuits do you speak of?

A. Of United States Gypsum against Certain-teed under the Beaver purchase arrangement.

Q. Was there a bond in connection with that lawsuit, that you know of?

A. Yes, sir.

Q. What was it?

A. I think it was for a million dollars.

Q. Do you know who was on the line on that bond?

A. Yes, sir.

Q. Who?

A. Mr. George Brown and Mr. Elisha Walker.

Q. Is your testimony that that had a bearing, perhaps, in your opinion, on the willingness of the Certain-teed Company to take out a license in May, 1929?

A. I think it had some bearing, yes, sir.



Q. Do you know whether that bond was released at the time that license agreement was signed?

A. I don't know at what time it was released.

Q. I show you Government's Exhibit No. 232, which purports to be a release of a bond under date of May 22, 1929, and ask you if you can identify the signatures 1772 to that release?

Mr. STEFFEN. Unfortunately, Your Honors, we had not expected to introduce this, and we do not have photostatic copies.

The WITNESS. Mr. Avery's signature for USG, and Mr. George M. Brown's signature for Certain-teed Products Corporation.

By Mr. STEFFEN.

Q. Could you identify that as a release?

A. I can't identify it, I have never seen it before.

Mr. STEFFEN. I think the document speaks for itself. We offer Government's Exhibit No. 232, and unfortunately I will have to —

Justice STEPHENS (interposing). Submit it to adverse counsel.

Mr. STEFFEN. We will have it photostated, Your Honor.

Justice STEPHENS. Thank you.

Mr. BROMLEY. No objection.

Justice STEPHENS. Have all counsel for the defendants seen it?

Mr. ADAMS. I have seen it, Your Honor. I have no objection.

Justice STEPHENS. Mr. Johnston, have you seen it?

1773 Mr. JOHNSTON. Yes, Your Honor. (Laughter.)  
If the Court please, to relieve the tension a bit, when I came down I was very much confused. A week ago I went to Pittsburgh over the weekend, and I came into a situation there that was a mixture of fog and smoke, and they call it "smog".

Well, the best expression I could fit into my condition, coming down here into this atmosphere of a mixture of Yale and Harvard, was to call it an intellectual smog. It was language I just couldn't appreciate. But the Court came to my relief yesterday, and spoke my language, and I learned that —

Justice STEPHENS (interposing). Perhaps it is only fair to warn you that the Court is from Harvard, or at least the presiding judge is.

Mr. JOHNSTON. I will limit it to Yale, then. (Laughter.)

When I found out what to look out for, being shot at from ambush, I then understood something of the language and procedure, and I refer to the often expressed statement, "Son; draw and drop him from the hip."

Justice STEPHENS. The Court is very much interested in your remarks, Mr. Johnston. The Court doesn't intend to have any shooting from ambush from any side of the case. The Court's inquiry as to whether you had seen this exhibit was seriously intended, to be sure that you did have an opportunity to see it.

1774. Mr. JOHNSTON. Yes, I saw it.

Justice STEPHENS. The detail of this, I assume, is not important. You merely want to prove that the bond was released?

Mr. STEFFEN. Yes, at the time that the license agreement was signed.

Justice STEPHENS. You may furnish photostats later. It may be received in evidence.

(The document referred to, marked as Government's Exhibit No. 232, was received in evidence.)

By Mr. STEFFEN.

Q. I would like to pursue the questioning that I was following just before I showed you this release, Mr. Brown.

I think you testified that one of the reasons why you favored, in 1928, taking out a license under the closed-edge board patent, was that the product would sell more readily?

A. Yes.

Q. And you now have stated a second reason which perhaps actuated the company or Mr. Brown, that Mr. Brown was personally under a \$1,000,000 bond; is that correct?

A. Yes, sir.

Q. Was there a further reason which you had at that time which would have made for taking out a license under the closed-edge board patent?

1775. A. Well, as I testified before, my other reason was having a more acceptable product for the trade.

Q. That was your first reason.

A. As I understood it, you cited the bond as the other reason.

Q. That is your second reason. Would there have been any other reason which you would have urged as a reason for taking out a license under the closed-edge patent in 1928?

Mr. ADAMS. I object to the form of that question on the

ground that he is asking the witness if there was an argument which he would have urged.

Mr. STEFFEN. I said "reason" that he would have urged.

Mr. ADAMS. Or reason that he would have urged back in 1928. I think that what he should be asked about is acts of the company —.

Justice STEPHENS (interposing). Well, the objection is sustained as to the form of the question, but you are not foreclosed, Mr. Steffen, from pursuing this line of examination. This witness has disclosed, Mr. Adams, that he was an officer of the company. The memoranda introduced, which he has identified, indicate that he was closely in touch with these transactions, and was informing other officers of the company about it. In view of the charges in the complaint, the Government is entitled to try to prove the reasons why this agreement was executed, which we 1776 think may be gone into if the witness knows them.

He is not to be asked to speculate, now, as to what might have been the reasons. He is to be asked what were the reasons which actuated the company for going in this agreement.

By Mr. STEFFEN.

Q. I am asking you particularly with regard to your testimony, Mr. Brown, in which you said that in 1928, you favored taking out a license under the closed-edge patent. You have now stated two reasons: one, that the closed-edge board would be more acceptable; and a second reason which I gather you feel would have actuated Mr. Brown. And I will ask you—was there another or any other reason which would weigh in your consideration on taking out a license under the closed-edge board patent?

A. I offered no other reason that I recall.

Q. Would the matter of patent control and price stabilization have been a factor?

Mr. ADAMS. I object to that. Again he says—"would price control have been a factor?" Adopting Your Honors' ruling, I object to that form of the question as being merely asking a hypothetical question.

Justice STEPHENS. The Court would think that the Government would be interested in whether or not it was a factor.

Mr. STEFFEN. That is what I asked.

1777 Justice STEPHENS. No, you asked whether it would have been, and the objection to the question

in its form is sustained. Ask him if it was a factor.

Mr. ADAMS. If he knows, Your Honor.

Justice STEPHENS. The witness has been thoroughly instructed that he is to answer nothing that he doesn't know.

You understand that, don't you, Mr. Brown?

The WITNESS. Yes, sir.

—By Mr. STEFFEN.

Q. Let me get the question clear. When you testified yesterday that you favored, in 1928, taking out a license under the closed-edge patent, was it a factor that you would have patent control under the license, or price control?

A. Personally, that had no bearing on it.

Q. Well, speak as an officer of the company.

A. I can't do that, because I don't know.

Q. Well, you, as an officer of the company, had some opinion, because you testified that you favored it —

Mr. ADAMS (interposing). I object to that.

Mr. STEFFEN. I want your reasoning.

Mr. ADAMS. I object on the ground that he did not so testify, and on the further ground—of course, this is my recollection of the evidence yesterday—that he testified that he didn't have anything to do with these negotiations whatever which led up to the signing of the May 22 contract, that he knew nothing about them, that he 1778 didn't go to Chicago.

By Mr. STEFFEN.

Q. Mr. Brown, you testified, I believe—I would like to have you correct me if I am wrong—that you, in 1928, favored taking out a license under the closed-edge patent; is that correct?

A. That is correct.

Q. And you have given us two reasons, one of which is that the closed-edge board was more acceptable to the trade; and, second, that there was a \$1,000,000 liability hanging over Mr. Brown's head.

I am now directing your attention to the fact, to which you have testified and which is clear, that under the license agreement there was a provision for price control, and I ask if that was a factor in your consideration?

Mr. ADAMS. I object to it on the ground that it is repetitious. He has already testified that it was not a factor.

Mr. STEFFEN. He has not so testified, Your Honor.

Justice STEPHENS. Read the answer of the witness to



the question on that subject, if you can find it, Mr. Reporter. My recollection is that he did say that it was not a factor.

Mr. STEFFEN. Personally, he said, and I am asking him as an officer of the company.

(The record was read by the reporter as recorded on page 2074, lines 10 to 16, both inclusive.)

1779 Justice STEPHENS. He says as an officer of the company he can't speak because he doesn't know.

Objection sustained.

Mr. STEFFEN. I think the witness is a little confused in his two capacities.

Justice STEPHENS. If you think he is confused, you may interrogate him further, but we can't ask him to testify to things he doesn't know.

Mr. STEFFEN. Certainly not.

Justice STEPHENS. You were an officer of the company at that time?

The WITNESS. I think the record will show that I was Assistant to the President, which was not an officer.

Justice STEPHENS. You were not a Vice President at that time?

The WITNESS. No, sir, that is my memory. The record will show, no doubt, the exact date I was elected.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Well, may I ask the broad question: On the basis of your connection with the company, which covers a period of many years, on the basis of your being Assistant to the President in 1928 and having written several letters under that title, and on the basis of your knowledge derived from these many years of association with the company as to its policies, on the basis of your acquaintance  
1780 with Mr. Brown and his policies, would Mr. Brown or the Certain-teed Company have taken out a license under the closed-edge patent if a substantial number of competitors, National, Ebsary, and others, had refused to take out a license?

Mr. ADAMS. I respectfully object on the grounds that the question is speculative, calls for a conclusion, assumes facts not in evidence, and is generally bad as to form. Also, I think that it isn't even competent. You can't ask a witness now, it seems to me, these many years later, to try to express an opinion as to what somebody else in the company

might have thought about a state of facts which isn't even in evidence.

Justice STEPHENS. We think the question as phrased is speculative, and asks for a speculative conclusion as to what someone else would have done. We think also, Mr. Steffen, that the record clearly shows that this witness has testified, in effect, in answer to proper questions on the subject, that stabilization was one of the factors which induced the November license agreement, and that one of the factors which was desired was, in effect, that all these companies should be under the November license.

Mr. STEFFEN. I will take up another line of questioning. Thank you.

Justice STEPHENS. Objection sustained.

By Mr. STEFFEN.

1781 Q. I now want to show you, Mr. Brown, Government's Exhibit No. 233. I believe —

Justice STEPHENS (interposing). Have you offered the last exhibit?

Mr. STEFFEN. I thought that 231 was offered and received.

Justice STEPHENS. Yes; and the release was received, that is right.

Mr. STEFFEN. Yes.

By Mr. STEFFEN.

Q. Let's take 233, which purports to be a memorandum to you, Mr. Brown, from Mr. A. D. Redfield, concerning a Speer Patent. I ask you to read the memorandum, please, and I will then ask you some questions.

Justice GARRETT. Is that dated July 30?

Mr. STEFFEN. No, it is dated August 2, 1929.

Justice GARRETT. This purports to be from Mr. Redfield to Mr. Brown?

Mr. STEFFEN. That is correct.

Justice GARRETT. And Mr. Redfield was the patent —

Mr. STEFFEN (interposing). I will ask the witness.

Justice GARRETT. Excuse me, I thought that had been shown already, but go ahead.

By Mr. STEFFEN.

Q. Who was Mr. Redfield, if you know, Mr. Brown?

A. He was an attorney.

1782 Q. Was he engaged in patent work, or what type of work, if you know?

A. He was in the firm that Chaffee was connected with. I can not give you the entire firm name. And I do not know his duties.

Q. And is this written on your usual interoffice form?

A. Well, it is a copy—I assume it was.

Q. Are you familiar with the Speer Patent?

A. No, sir, I don't remember this.

Q. Do you remember having seen the memorandum at all?

A. No, sir.

Q. Could you state whether or not it is a genuine memorandum?

A. It looks like a copy of a genuine memorandum.

Q. Do you have any means of identifying it as being Mr. Redfield's memorandum?

A. No, sir, I haven't.

Q. Do you know who made the writing in the lower left-hand margin?

A. No, sir, I don't recognize that.

Q. Are you familiar with Mr. Redfield's writing?

A. No, sir, I am not.

Mr. STEFFEN. Your Honor, we offer this in evidence on the ground that it is a copy of a memorandum, or inter-office communication, which came from the files of 1783 the Certain-teed Products Corporation, which is evidenced by the fact that they have the words, "Item No. X322", at the top. This witness has been unable to identify it as a memorandum which he saw.

Mr. ADAMS. We object to it, Your Honor, first on the ground that it has not been identified in any way. The sole fact before the Court is that it came from the Certain-teed Products Corporation's files.

Justice JACKSON. A little louder, please, Mr. Adams.

Mr. ADAMS. I am sorry, Your Honor.

It is said to have come from the Certain-teed Products Corporation's files, of which there can be no doubt. But this witness can not identify it in any way.

Moreover, it is, if anything, a copy of something of which there might have been an original sometime. We don't even know that.

Secondly, we object to it on the ground that it is a privileged communication. Mr. Redfield, as the witness stated, was an attorney employed by Mr. Chaffee, who was an attorney generally employed by the company. Mr. Redfield worked on matters for the company, didn't he, Mr. Brown?

The WITNESS. I think when Mr. Chaffee was overloaded, he handled some of the company problems.

Justice STEPHENS. Do you wish to be heard on the question of identification any further than you have 1784 been, Mr. Steffen? I think you have really stated your position, but I will be glad to hear you further.

Mr. STEFFEN. I would refer Your Honors to the case that I cited this morning, *United States v. Vehicular Parking, Ltd.*

Justice STEPHENS. That goes to the question of whether it is confidential.

Mr. STEFFEN. It also has very strong language in regard to the rules of evidence that should apply on the admissibility of documents, and I will refer you to the bottom of page 5 of the mimeographed opinion, in which the Court says—he speaks of several exhibits and then refers to Rule 43 (a) of the Federal Rules of Civil Procedure, which, as stated in the opinion, provides: “\* \* \* All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States”, and so on.

Then quoting from the top of page 6, from Moore (3 Moore, Federal Practice), where it is summarized as follows: “But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis” —

Justice STEPHENS (interposing). I have missed the place where you are reading from.

1785 Mr. STEFFEN. At the top of page 6 of the mimeographed copy.

Justice STEPHENS. I see it. Go ahead.

Mr. STEFFEN. Where the author says: “‘But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis of relevancy and materiality.’ This rule is especially applicable to conspiracy cases—here, to restrain a monopolized trade in the parking meter industry—because it simply crystallizes established law, e. g., liberality has always been accorded to the admission of evidence in cases where conspiracy issues are present.”

Now on this particular item, I would feel that the exhibit has not been identified by Mr. Brown. That is perfectly clear. The exhibit, however, has come from the files of the defendant, the Certain-teed Products, and that is admitted; and it definitely has a bearing upon the case,



it is relevant and material. And I think it is in the usual form and should be admissible upon that ground, under a liberal construction of 43(a).

Upon the second ground, which has to do with the fact of privilege, we, of course, would expect to show that the privilege had been waived, at a proper time.

Justice GARRETT. I want to ask you, Mr. Steffen, there is nothing in that rule that changes the ordinary rule of law about identification of a document? Doesn't 1786 the liberality begin after your document is identified?

Mr. STEFFEN. It rather shifts the burden, if I may say—at least that is my construction, or the Government's construction—it shifts the burden from what it formerly was.

You used to have to have explicit identification, and then it would be subject to being introduced. Your identification can be less now, and it goes to its weight; and it is up to the other party to show at the proper time whether it is or isn't genuine.

And as Moore states in the case I read: " \* \* \* in general places admissibility upon the sole basis of relevancy and materiality".

This is clearly relevant and material, and it is sufficiently trustworthy in that it has come from the files of the Certain-teed people, and has been in their files for these many years.

Justice GARRETT. The question of materiality and relevancy, that arises after you get your document identified.

Mr. STEFFEN. It can be identified by circumstances, Your Honor, is our contention. And one of the circumstances is the place where it has been taken from.

Mr. ADAMS. The sole circumstance, I might say. 1787 Justice STEPHENS. So far as my own views are concerned, with all due respect to the writer of this opinion which you have handed me I certainly do not think that Rule 43(a) is intended to abolish the standards of competency with respect to evidence.

The writer says, "But it is subdivision (a) of Rule 43 that revolutionizes federal evidence, and in general places admissibility upon the sole basis of relevancy and materiality."

On that theory hearsay evidence could be used at large in any case in court.

We are of the view—I think I reflect the views of my associates, I have talked to both of them; if not, they will

please express themselves—that this is not sufficiently identified, and that it is not the best evidence.

It is obviously a copy rather than the original. The absence of the original isn't accounted for. The correctness of the copy isn't testified to. So it is not the best evidence and not introducible as secondary evidence. We think that it goes too far to say that merely because a document is found in the files of an adverse party, that that alone makes it admissible in evidence, so far as identification is concerned. There is no other circumstance but that here. In every other instance in which we have ruled, there has been some other circumstance. We have been trying to rule consistently and fairly on this subject, but we think this goes beyond the proper limits. The objection 1788 is sustained. The ruling is not based on the ground of privilege, we do not rule on that with respect to this exhibit.

Mr. BROMLEY. May it please the Court, I should like to be heard a moment, out of order, in connection with Your Honor's statement a little while back as to what the witness had testified to with respect to the desirability of securing stabilization, and the question of whether or not his company would have liked to have had others in the industry take licenses.

My recollection is that the testimony which the witness gave in that connection had relation solely to the November licenses, and that he always maintained that he had very little to do with the May, 1929, licenses. And in giving his reasons why he favored taking the May, 1929, license, which he did this afternoon, he limited them to two, that is, that it was a desirable product and that he wanted to settle the litigation. I just mention that now—perhaps we can take a look at the record tonight and see whether I am right or wrong, but I didn't want it to pass unchallenged when my recollection was that his testimony had no relation to the May licenses in the respects which your Honor mentioned a few moments ago.

Justice STEPHENS. You may be correct, Mr. Bromley. It is hard at times to hold all this testimony in mind. However, you may consult the record tonight, and if the Court has misstated the testimony it would be glad 1789 to be so advised so that it might make any necessary correction, although you can bring out the same matter on cross examination, I take it.

Mr. BROMLEY. Yes, Your Honor.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, Government's Exhibit No. 234, which purports to be an inter-office letter between yourself and Mr. Whittemore under date of October 3, 1929.

Justice STEPHENS. We don't find that in this file.

Mr. STEFFEN. I have skipped one, Your Honor.

Justice STEPHENS. After this Redfield memorandum, September 6th is the next in my file.

Mr. STEFFEN. We are skipping that.

Justice STEPHENS. I have it, thank you. Proceed.

By Mr. STEFFEN.

Q. Have you examined Exhibit No. 234, Mr. Brown?

A. Yes, sir.

Q. And is that written on your usual inter-office form?

A. Yes, sir.

Q. Can you identify the handwriting in the third paragraph, the word "but"?

A. Yes, it is my correction.

Q. Would you say this was your memorandum?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 234 in evidence.

1790 Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government Exhibit No. 234, was received in evidence.)

By Mr. STEFFEN.

Q. We now show you Government's Exhibit No. 235, which purports to be a letter written by the United States Gypsum Company to the Certain-teed Products Corporation under date of November 5, 1929, and ask if you can identify that letter as one which you received?

A. There is nothing to indicate that I received it, but I assume I did.

Justice STEPHENS. Just a moment.

The WITNESS. I am sorry.

Justice STEPHENS. What was the question?

(The reporter read the preceding question and answer.)

By Mr. STEFFEN.

Q. Do you know the signature of the secretary?

A. No, sir, I do not.

Mr. ADAMS. We will agree that we received it.

Justice JACKSON. Whose signature is that?

Mr. STEFFEN. Can you tell me, Mr. Bromley?

1791 Mr. BROMLEY. Mr. R. G. Bear.

Justice STEPHENS. Mr. Adams admits, for Certain-teed, that this was received, and the record may so show.

Mr. STEFFEN. We now offer Government's Exhibit No. 235 in evidence.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to marked as Govt. Ex. No. 235, was received in evidence.)

By Mr. STEFFEN.

Q. We now show you, Mr. Brown, Government's Exhibit No. 236, which purports to be your inter-office letter addressed to Mr. Van Hagan under date of November 25, 1929.

Justice STEPHENS. What is that one?

Mr. STEFFEN. I think there has been a mistake, we have given the witness the wrong letter. We will proceed with the letter which the witness has.

Justice STEPHENS. Which is the letter of 12/3/29?

Mr. STEFFEN. December 3, 1929, yes—addressed to Mr. W. E. Coffin, purporting to be sent by Warren Henley.

1792 By Mr. STEFFEN.

Q. Mr. Brown, can you say whether this follows the usual form of inter-office communications of the Certain-teed people?

A. Yes, sir.

Q. And have you examined the initials down at the bottom of the exhibit?

A. I would identify them as Mr. Henley's.

Q. Do you recall having seen the memorandum?

A. No, sir, I don't recall it.

Mr. STEFFEN. We offer Government's Exhibit No. 236 in evidence.

Mr. BROMLEY. We make the usual objection, and in addition, object on the ground that it is entirely immaterial and



irrelevant. I am aware of no charge in the complaint as to which this could possibly have any relevance.

Justice STEPHENS. It occurred to the Court while reading it, Mr. Steffen—I will be glad to hear you on it—that while you do charge in the complaint that there was a problem of price cutting and price war involving the use of “seconds” prior to the signing of the license agreement, and leading up to it, you do not charge anything with respect to that afterwards. What is the relevance of this?

Mr. STEFFEN. I would like to be heard at length upon the relevance of the exhibit.

Justice STEPHENS. Very well.

1793 Mr. STEFFEN. We charge in the complaint, first, an attempt to monopolize the business, and we charge restraint of trade under Sections 1 and 3. We are charging in the complaint that the defendants have endeavored to standardize the product which they were selling. One of the basic charges in the complaint is that the effort was made by virtue of these agreements to standardize the products which they were selling in order to facilitate price control.

If you will notice the very last paragraph of the memorandum it says, “I would suggest that Mr. C. O. Brown, at the next Licensor Meeting, bring this matter up for discussion, and if possible, develop a definite policy covering” it, as an industry policy.

Now the agreement of course is when they first reach their position. There are provisions in the agreement concerning “seconds” and open-edge board. Here is a showing, as we contend, after the agreements had been signed, where they are carrying them into effect, and we will have a great deal of evidence showing the effects of this conspiracy which have operated to standardize board and to work out a restraint of trade.

Justice STEPHENS. Do you wish to reply, Mr. Bromley?

Mr. BROMLEY. The last paragraph, of course, has no reference to an industry policy. It clearly means that the licensee will bring it up at a meeting with the licensor, and endeavor to have the licensor put something in his bulletin or make some provision about it.

1794 Mr. STEFFEN. That is right.

Mr. BROMLEY. Now as to Mr. Steffen’s reference to open-edge board, I suppose he is talking about the first paragraph. Well, “Open Edge Recut Wallboard” is patented board. This product, “Recut Wallboard” is made by

taking the patented board and cutting it into definite shapes, and selling it as "cut stock", I believe it is called, and there are provisions in the bulletin about that, but it is all patented board. I don't believe there is a single charge in the complaint to which this could have any relevancy. I think my friend thinks that it bears on his charge that we fixed the price on unpatented board, but that is not so, because the reference in the first paragraph to "Open Edge Recut Wallboard" is to patented board, which the patents will show. I think he is laboring under that misapprehension.

Furthermore, as your Honor has said, the charge about "seconds" was before the license, and not afterward.

Justice STEPHENS. The Court thought you had in mind introducing it because of the charge concerning "seconds" and not with reference to the charge concerning standardization.

Mr. STEFFEN. We have both, your Honor.

Justice STEPHENS. With respect to standardization, if this open-edge recut wallboard is, as the bulletins are said to show, patented board, what does this prove with respect to articles not patented and the standardization of the industry?

Mr. STEFFEN. We expect to show, your Honor, that the industry endeavored to get rid of "seconds", as they tried to get rid of open-edge board, and they did it for the purpose of better facilitating a price stabilization, according to the Government's allegations.

This is very direct evidence of the conspiracy working out to bring about a standardization of product, and the elimination of "seconds", just exactly as was done in the Standard Sanitary case where they wanted to get rid of "seconds" and they proceeded by various devices to eliminate them.

The proof will show in this case that they did eliminate "seconds" and they eliminated them for the very reason that they did in the Standard Sanitary case, that it made it much easier to fix prices on one product than it did if they had to sell an open-edge board, and a "seconds" board, and one type or another in competition with their No. 1 board.

Justice STEPHENS. Well, counsel's argument, if I may interrupt you, Mr. Steffen, because I want to understand you thoroughly and be advised as to the contentions both ways, seems to be really a reiteration of the charges you make in the complaint.

Of course you charge standardization and the elimination of "seconds" and the like, and you are entitled to try to prove that. But the question we have here is how does this particular exhibit tend to prove it. That 1796 is what we don't quite get.

Mr. STEFFEN. Well, in a measure—this is of course a preliminary exhibit—it indicates that they are proposing to take up before a licensor meeting —

Justice STEPHENS (interposing). Proposing to do what?

Mr. STEFFEN. To take up the question before a licensor meeting, and as Mr. Bromley said, a licensor meeting would be one at which licensor and licensees had got together, and where United States Gypsum Company would put the matter in their bulletin, and it would become a regulation for all the industry. That was what Mr. Bromley stated, and that is my understanding of it, and if it became an industry policy to eliminate "seconds", it would very clearly be an attempt to monopolize.

Justice STEPHENS. We think the exhibit is admissible, and that the objection goes to the weight. The objection is overruled.

Mr. ADAMS. May I record my objection, that there is no proper foundation, and on the same grounds that I argued with respect to the other Henley exhibit. Mr. Henley is dead and Mr. Van Hagan is dead —

Justice STEPHENS (interposing). Mr. Henley was connected with the company, was he not?

Mr. ADAMS. That is right.

Justice STEPHENS. And the witness has identified these initials as his. We think it is sufficiently identified. Did this also come from the files of Certain-teed?

1797 Mr. ADAMS. Yes.

Justice STEPHENS. Your objection may be recorded, but it is overruled. The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 236 was received in evidence.)

Justice STEPHENS. The Court will take its usual afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. Your Honor, I should like to go back to our Exhibit No. 233 for a minute. That is the Redfield memorandum to Mr. Brown, regarding the Speer patent.

Justice STEPHENS. Yes.

Mr. STEFFEN. I would like to make a brief statement, and then ask defense counsel to stipulate, if they will—if they don't care to, they need not. Mr. Redfield appeared before the grand jury and at that time he stated that he waived any privilege. He also stated that he identified that as being his memorandum. I will show defense counsel the excerpts from the grand jury minutes and also the Court, and ask defense counsel if they will stipulate 1798 that that is true. Otherwise we will have to ask to have Mr. Redfield subpoenaed and go through the usual procedure.

Justice JACKSON. Would his waiver affect his client?

Mr. STEFFEN. He recites that his client authorized him to waive it.

Justice JACKSON. I misunderstood you.

Mr. STEFFEN. If you like I will read the excerpt from the grand jury minutes.

Justice JACKSON. You needn't mind, not if you say that it so states. You had better get that straight in the record, though, Mr. Steffen. Judge Stephens understood just as I did.

Justice STEPHENS. That it was merely a lawyer's waiver —

Justice JACKSON (interposing). Not the waiver of the client.

Mr. STEFFEN. Let the record show that the grand jury testimony of Mr. Redfield is to the effect that —

Mr. ADAMS (interposing). Perhaps we had better look at it.

Justice STEPHENS. Let counsel look at it before you put it in. Maybe there will be some objections.

Mr. STEFFEN. I would like to have the record show that I am showing to defense counsel page 2373 of the grand jury minutes, beginning at the point marked, and continuing through the point marked on page 2374; and also the top paragraph on page 2375.

1799 Mr. ADAMS. I have read these excerpts from the grand jury minutes to which reference is made, and I cannot agree that it constitutes a waiver of the privilege; particularly in that all that happened was that the witness was told that he might identify a document.

Justice STEPHENS. Hand those minutes to the Marshal and let the Court inspect them.

(The grand jury minutes referred to were handed to the Court.)



Mr. ADAMS. And I also want to state that there is no showing that Mr. Dowd was authorized by the company to waive anything.

Justice STEPHENS. Mr. who?

Mr. ADAMS. Mr. Dowd, the man referred to in the testimony.

Mr. STEFFEN. Perhaps the Court had better read the testimony.

Justice STEPHENS. Let us read it, and then we will know better what you are talking about. It commences at page 2373, is that correct?

Mr. STEFFEN. Yes, at the point marked.

Mr. ADAMS. May I say this, your Honor, to finish my statement, that there is no showing there that Mr. Dowd intended to waive any privilege.

Secondly, there is no showing that Mr. Dowd was authorized to waive any privilege.

1800 Thirdly, my instructions in this case, as counsel for Certain-teed Products Corporation, are not to waive any privilege and that as soon as an attempt is made to use a document prepared by our counsel, which is the first time that we have had an opportunity to raise it, that I should raise the point.

Moreover, I wish to suggest to the Court that under no circumstances does the mere fact that a party was willing that a document be presented to a grand jury cause is to be construed as a waiver by the party of a privilege of this character. A grand jury procedure, as the Court knows, is a star-chamber proceeding, and is secret. The jurors are sworn to secrecy. A citizen is required to submit to such a grand jury such evidence as he may have in the interests of justice. A citizen can then, at the appropriate time, when it is attempted to use a document presented to a grand jury against that citizen in some other proceeding, raise the question of privilege.

There was no publication of this, this was produced before the grand jury under compulsory process, and we do not and did not intend in any way to waive any privilege, and if the Court wishes to be reassured on that point, I will bring Mr. Dowd here from Chicago and have him testify about it. Certainly my instructions are to that effect. If there had ever been any question about a waiver of privilege, I can assure the Court that Mr. Dowd would never have said what he is reported to have said by a former employee who unquestionably was relying upon the  
1801 secret character of the grand-jury proceedings.

Mr. STEFFEN. Was Mr. Redfield a former employee or a former lawyer?

Mr. ADAMS. He was a former lawyer. It wouldn't make any difference whether he was an employee or not, he was acting here in his official capacity.

Justice STEPHENS. It would appear to us, Mr. Adams, that where a lawyer who it is now admitted was an attorney for the Certain-teed, at the time of the grand-jury hearing stated that he had consulted with his client, and the client was not insisting upon the privilege, as this seems fairly to indicate, that that would, prima facie, constitute, at least for that proceeding, authority to waive the privilege.

The Court always acts upon the presumption that a regularly-employed lawyer has the authority to act, and the burden is upon the opposing side to prove the contrary —

Mr. ADAMS (interposing). I may —

Justice STEPHENS (interposing). Don't interrupt me, I want to finish what I am saying.

That point seems quite clear to us, although we are not ruling finally upon the matter. It may be that at that proceeding Mr. Dowd might have been produced to repudiate the authority of his own lawyer, claimed by his lawyer, but we are not in that proceeding now. It looks to us as if that was a waiver for the purpose of that proceeding.

1802 But the other point you raise is a novel point.

Our tentative impression is that a privilege once waived is waived, and that the document no longer is confidential, but it may be that waiver for the purpose of a grand jury hearing is not effective in a subsequent civil proceeding, and if counsel regard the matter as serious, and if this class of testimony is going to occupy the attention of the Court, we will give you an opportunity to present authorities on that subject.

What do you say on that subject, Mr. Steffen?

Mr. ADAMS. Could I just interrupt one moment, your Honor, to say that my recollection is quite clear that Mr. Redfield was not counsel for the company at that time. I may be wrong about it. I think he was a former attorney.

Justice STEPHENS. Very true, but he states that he had talked with Mr. Dowd about the identification of these documents. A client's privilege persists even after the relationship of lawyer and client has been terminated, Mr. Adams. Otherwise, the privilege wouldn't amount to any-

thing. As the record shows, he was the attorney for the company, and this witness has testified that he was an attorney for the company at the time this document in question was prepared, and then he, in testifying before the grand jury, recognizing apparently that the client's privilege persists even though the client-attorney relationship was terminated, first stated that he ought to claim the privilege, and then later said that he had been in communication with Mr. Dowd and was not claiming the privilege.

Mr. ADAMS. The only thing I wanted to clear up was that your Honor seemed to base part of your statement here on the proposition that Redfield, at the time of the grand-jury proceeding, was an attorney employed by Certain-teed and acting for Certain-teed.

Justice STEPHENS. That is not material to the existence or non-existence of the privilege. If the privilege ever existed, it existed then.

Mr. ADAMS. I also place some reliance, your Honor, on the grand-jury testimony in which it was stated that he would identify the document. I don't take it that that meant that that was a waiver, and I don't construe it that way. Now your Honors may. But it seems to me—and I want to make it clear that I was not counsel for the company in that case at that time, and I am now required to act under the instructions of my client with respect to this class of testimony —

Justice STEPHENS (interposing). We understand that.

Mr. ADAMS. I cannot but state to your Honors that it seems to me that since there is this question as to whether the client has or has not waived the privilege, as a matter of fact, that we should have an opportunity to produce a witness to testify on that subject.

Justice STEPHENS. Where is that document?

1804 Mr. STEFFEN. It is on your desk, your Honor.

Justice STEPHENS. Oh, yes.

Mr. ADAMS. If your Honor pleases —

Justice STEPHENS (interposing). You needn't be heard any further at the moment. We have heard both sides on the subject.

The Court is of the view that this is still not identified. Counsel have not stipulated as to identification, as requested. It may have been identified before the grand jury, but it is not identified here. So the ruling still stands that the document is not identified and we therefore

need not at this time rule on the question of the waiver of privilege.

Mr. STEFFEN. We ask authority, your Honor, to subpoena Mr. Redfield if the defendants will not stipulate on the basis of that record, and we would like your reaction on that. Our thought is that we would save the Court time if the defendants would stipulate in accordance with the testimony before the grand jury.

Justice STEPHENS. You have the usual recourse to subpoena if you need to use it.

By Mr. STEFFEN.

Q. Getting back, Mr. Brown, to Exhibit No. 236 —

Justice STEPHENS (interposing). Before you start with that, Mr. Steffen, if you are going to continue to press this document, in a further attempt to identify it, the Court will be glad if counsel on both sides, Mr. Adams who is objecting, and you who are presenting the document, 1805 would have your assistants search for any authority they may be able to find on the subject of waiver before a grand jury constituting a permanent waiver.

Mr. STEFFEN. We have authorities, I think, to indicate that a waiver at that time is a waiver at all times.

Justice STEPHENS. That is a novel point to the Court.

By Mr. STEFFEN.

Q. We now get back, Mr. Brown, to Exhibit No. 236. Do you have it before you?

A. Yes, sir.

Q. I want to ask you whether you attended any licensor meeting at which the matter of recut wallboard was discussed, if you recollect.

A. I don't remember such a meeting, I could have attended it.

Q. Do you know what is meant by a "licensor" meeting?

A. Yes, sir.

Q. What is meant?

A. A meeting called by the licensor of the licensees to discuss any problems that should be properly discussed.

Q. Having relation to the license agreement?

A. It could have reference to something as outlined in this letter.

Q. Do you recall whether your company was making "seconds" at this time, which were subject to this 1806 memorandum?



A. I think they were. Every company makes "seconds", it can't avoid it.

Q. Could you give me your opinion, as sales manager at one time of Certain-teed, whether the "seconds" had the effect described here in the second paragraph, that is, of demoralizing prices?

A. Well, a "second" sold of any manufactured product is not a good thing. It doesn't do the value of your product any good. What is referred to here is the method of re-claiming, which in my opinion does not hurt a product, but to just sell them as "seconds", does.

Q. Will you explain why selling as "seconds" does affect the market?

A. Well, a "second", in my definition, means a defective product.

Q. That is right.

A. And if you sell a defective gypsum board or defective roofing, or defective anything else, it doesn't do the reputation of the perfect grade material any good because you don't know where it is going to be used, or where it is going.

Q. Would it have any effect on price?

A. No, sir, I don't think so.

Q. Would you offer your "seconds" at the same price as your No. 1 grade?

1807 A. No, sir.

Q. Would that possibly tend to unstable prices?

A. Not a normal production in a plant, of "seconds", no.

Q. But a larger amount might, is that the point?

A. Naturally.

Q. Now perhaps I have asked you this question, but can you recall at all having discussed at one of these licensor meetings, anything to do with "seconds" or with recut wallboard?

A. I think it was discussed, but I don't remember any of the details.

Q. Now, at one of those licensor meetings who would be present? I am asking this question in general, and then I will try to get it in particular.

A. Representatives of the licensor would be present, and all licensees would be invited. Whether they would be there or not is another matter.

Q. Who attended, to your knowledge, from United States Gypsum Company, at any meeting that you attended?

A. Well, they weren't always attended by the same people.

Q. Name them.

A. Mr. Henning, Mr. Avery, Mr. MacLeish—they all attended at different times.

Q. And from time to time were members from all the other licensees present when you were there?

A. Yes, sir.

1808 Q. How often, do you know, were the licensor meetings held in 1929 and 1930?

A. I don't know how often. Usually sixty or ninety days apart, something like that.

Q. I now show you Government's Exhibit No. 237, which purports to be your letter to the United States Gypsum Company under date of January 2, 1930. Can you identify your signature?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit 237.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. The letter is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 237 was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 238, which purports to be a letter from Scott, Bancroft, Martin & MacLeish, under date of January 18, 1930, addressed to C. O. Brown, and ask if you can identify that letter. Are you familiar with any of the writing at the top, Mr. Brown?

A. Yes, sir.

Q. What are you familiar with?

1809 A. The initials "AW" and "COB". "Better have Chaffee approve" in my opinion is in Whittemore's writing.

Q. And do you know whose writing that is in the body of the letter, "Avery resetting of calcined edge?"

A. No, sir. I don't recognize that.

Q. Or "Hoggatt edge heater"?

A. No, sir, I don't recognize that writing.

Q. Do you know the signature of Mr. MacLeish?

A. Yes, sir.

Q. Would you identify this as his signature?

A. I would.

Mr. STEFFEN. We offer Government's Exhibit No. 238

in evidence.

Mr. BROMLEY. And we object to it, not only on the usual ground, but also on the ground that it is immaterial to any charge in the complaint. The letter obviously refers to an exchange of licenses with respect to overlapping patents covering a feature of board manufacture. These patents were never put in any general license, and the license here referred to isn't related to and has nothing to do with, the licenses mentioned in the complaint.

Justice JACKSON. I was just wondering what that license was, it isn't identified in this letter.

Mr. BROMLEY. No, it is not.

Justice STEPHENS. What do you claim for it? \*

1810 Mr. STEFFEN. We claim that it has to do with the general license, and in the third paragraph it indicates that Mr. MacLeish has the purpose of writing these patents into the general back-log of patents in the October agreement, and he states rather explicitly, "as we might later want the right to fix prices included in our license to use this patent."

Mr. BROMLEY. But you know, Mr. Steffen, that it was never done, there was nothing ever done about it. It cannot have any relevancy.

Mr. STEFFEN. It is utterly immaterial whether anything was ever done about it. This shows a purpose and intent on the part of the United States Gypsum Company, and apparently with approval on the part of the Certain-teed people, that these patents should be interchanged, and that the agreement should be so drafted that the patents could be written into the general agreement to increase the back-log of patents upon which they proposed to fix prices. They did exactly the same thing in connection with the perforated lath patents, and those are now in evidence, I mean the license agreements are in evidence. They first issued license agreements, then they gave gratuitous licenses in which it was provided that they would be part of the general license agreement and would be subject to the price fixing thereby provided.

Mr. BROMLEY. You have alleged that in the complaint. There is no allegation that covers this subject at all in the complaint. It isn't mentioned or even sug-

1811 gested.

Mr. STEFFEN. We have a broad allegation of price fixing, and this is evidence of their intent and purpose to do that.

Justice STEPHENS. The Court is of the view that it is not admissible, Mr. Steffen, because you concede that whatever the intention may have been with respect to putting this license under what you refer to as the "back-log" of licenses, it wasn't done —

Mr. STEFFEN (interposing). I do not concede that, your Honor. Mr. Bromley asserted that, but I did not concede that.

Justice STEPHENS. Do you charge in the complaint that it was done?

Mr. STEFFEN. We make a very broad charge in the complaint. We haven't charged all the evidence that we expect to introduce, and of course are not required, as your Honor knows, to charge each little bit of evidence.

Justice STEPHENS. That is right.

Mr. STEFFEN. What we charged was a broad charge that the defendants sought to fix prices, and that they sought to monopolize the gypsum industry. We have introduced all of the basic agreements. We now show that in carrying out the conspiracy or combination, which we think was established by those agreements, that they took a resetting patent and exchanged it with the Certain-teed people, and provided that they would be permitted to write that 1812 into the general October agreement for the purpose, if they saw fit, of fixing prices.

Justice STEPHENS. You do not concede, then, that that was not done?

Mr. STEFFEN. No, I do not concede that it was not done.

Justice STEPHENS. Do you contend that it was done, do you intend to prove that it was done? If you intend to prove within your general charge of conspiracy and price fixing, that the exchange of licenses to which you refer, was accomplished, that is a different matter.

Mr. STEFFEN. I think the exchange of licenses was accomplished, yes. I think that all Mr. Bromley is stating, as I understood him, is that he thinks that they never actually did sign a second or additional agreement to carry out what Mr. MacLeish had in mind here, and that is a little provision providing that this agreement should be put in and should constitute a further basis for price fixing.

We offer it to show their intent and purpose, and we are prepared to go ahead —

Justice STEPHENS (interposing). You offer it to show their intent and purpose, but Mr. Bromley's objection, which I thought you agreed to as he made it, was that it



was not carried out. Well, if it was not carried out, it wouldn't be entitled to any weight even if technically relevant. We have some doubt on the matter, however, because the exhibit is so vague that we can't tell what it is about.

Mr. BROMLEY. All of the license agreements alleged in the complaint and attacked in this suit are now in evidence. This letter gives the patent numbers in the first paragraph of the two patents which are talked about in this letter. A comparison of these patent numbers with the patent numbers in the licenses will disclose that they are not contained in the licenses, which would seem to end the matter, and Mr. Steffen knows that.

Justice STEPHENS. Is that correct?

Mr. STEFFEN. That is incorrect, your Honor, that is, the statement that I know that.

Justice STEPHENS. Is it correct or incorrect that these two patents, described in the first paragraph of the proposed Exhibit 238, are not in the license agreements which you have in evidence?

Mr. STEFFEN. I think that is correct, that these two patents, the Avery resetting patent and the Hoggatt patent, were not incorporated in the October agreements at the time that they were signed and executed by all of the members of the industry.

Mr. BROMLEY. Or in any agreement, sir.

Mr. STEFFEN. And this letter indicates, as the Government contends, that this process of using patents and using them for purposes of putting them in a general agreement, has continued. We are not bound by the patents that just happen to have been described in October 1929. If they had a purpose concerning any subsequent patents, to put them in that agreement, that would be relevant from the Government's standpoint to establish their intent and purpose in the fixing of prices, and if we can show that the defendants expected to use these patents at some future time, for purposes of forming a back-log or a stronger basis upon which they could fix their prices, that is highly relevant to show the sort of conspiracy and combination that we are dealing with. That is from the Government's standpoint.

Justice STEPHENS. Well, it is practically the adjournment time. We, as presently advised, have great difficulty in seeing any relevance in the document, and we are anxious to let both sides in the case prove everything that is prop-

erly relevant; but equally anxious not to have in the record things that are so remote as not to have any legal value, because the record is going to be large enough anyway.

Since it is not charged that these patents went into the license agreement, which is the principal predicate of your case, nor that they went into any other license agreement, we have difficulty in seeing its relevance, but we will consider the matter during the recess.

You may announce the recess until tomorrow at ten o'clock.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, December 15, 1943.)

1815 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017.

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, DECEMBER 15, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1820 Mr. BROMLEY. Now may I go back to that matter of which I spoke yesterday, and call the Court's attention to page 2077?

Justice STEPHENS. Yes. The Court read the record on that subject last night.

Mr. BROMLEY. That is Your Honor's statement beginning at line 14.

Justice STEPHENS. Proceed, Mr. Bromley.

Mr. BROMLEY. A reference to the top of that page, to Mr. Steffen's question, on the third line on page 2077, shows that he was talking about the May, 1929, licenses, because he uses the phrase, "under the closed-edge patent".

Justice STEPHENS. That is the question that commences at line 20 on page 2076?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Let me read it.

Yes, Mr. Bromley?

Mr. BROMLEY. And if reference is made to this line of questioning, which begins on page 2074 at line 10, it will be apparent that Government counsel was talking about the May, 1929, licenses all the way through. So that Your Honor's statement on page 2077, it seemed to me, was to the effect that you understood the testimony to be that stabilization, and the factor that all the companies would take a license, were reasons which Mr. Brown had testified to for entering into the May licenses. Now 1821 I think that is incorrect, because a reference —

Justice STEPHENS (interposing). You think that is incorrect?

Mr. BROMLEY. Yes. I think he testified, with respect to price stabilization and the factor of all of them taking licenses, that those were reasons in connection with the November licenses, and not the May licenses.

Now I think I can establish that by referring to his testimony in which he mentioned —

Justice STEPHENS (interposing). Stabilization?

Mr. BROMLEY. Yes.

Justice STEPHENS. That is on page 2049, isn't it?

Mr. BROMLEY. Yes, sir, 2048 or 2049 —

Mr. STEFFEN (interposing). We might shorten this, Your Honor. We would be very glad to agree with Mr. Bromley that the witness' testimony had to do with the November license agreement; and that the May license agreement, he testified he had very little to do with, and knew very little about.

Mr. BROMLEY. I am not interested in what counsel's position is. I want to make sure that the Court understands it, and that I am right in my understanding of it, as far as the Court is concerned.

Justice STEPHENS. Thank you, Mr. Steffen, for your interjection, but the Court itself is interested in the 1822 statements made on the Court's part.

Where is this on page 2049 that you are referring to?

Mr. BROMLEY. It starts at line 24 on page 2048:

"Q. Have you read this memorandum of July 3d, Mr. Brown?

"A. Yes, sir."

Then over the page:

"Q. I want to take you to the second page, the first line. There you say, 'Taking these things into consideration, plus other advantages', and so forth \* \* \*"

Then the answer:

"A. There would be a stabilized market on gypsum lath.

"Q. And by 'stabilized' you mean what?

"A. Price control."

Now since he was talking about the contents of the July 3rd memorandum, his reference must be to the November licenses, because the prior license had been executed in May. So it seems to me that his testimony about price stabilization certainly refers to the November and not the May licenses.

Justice STEPHENS. Well, the Court will, then, order a change made in its statement at page 2077, where the Court says:

"We think the question as phrased is speculative, and asks for a speculative conclusion as to what someone else would have done. We think also, Mr. Steffen, that the record clearly shows that this witness has testified, in effect, in answer to previous questions on the subject, that stabilization was one of the factors which induced the November license agreement \* \* \*"—after the word "induced" in line 19, insert the words "the November license", striking the word "this". Otherwise, the error would seem to be harmless, as counsel took up another line of questioning.

It is important that no incorrect statements as to what witnesses have testified to should be in the record, on the part of the Court.

Mr. BROMLEY. I did want to demonstrate that the reference to "all these companies should be under the license", in Your Honor's statement, likewise the testimony which the witness gave on that subject referred only to the No-



vember and not the May license, and I can demonstrate that by referring to page 2063, line 11:

"A. We preferred to see as many as possible sign."

I say that answer has reference to the November license, and I demonstrate that by going back to page 2062, the question beginning at line 18. Counsel is talking about the memorandum of August 9, 1929, which was after the May licenses.

Justice STEPHENS. Line 18 of what page?

Mr. BROMLEY. Page 2062.

Justice STEPHENS. That says:

"Q. I want to ask you one or two questions, Mr. Brown, concerning your memorandum of August 9, 1929."

1824 Mr. BROMLEY. Yes, sir. Now since counsel and witness are talking about the memorandum of August 9, 1929, when you go over the page the answer in line 11, "We preferred to see as many as possible sign.", must refer to the November license and not to the May license.

Justice STEPHENS. Is there any dispute about that?

Mr. STEFFEN. No, Your Honor.

Justice STEPHENS. Then in line 21, page 2077, before the word "license" at the end of the line, the word "November" will be inserted.

Mr. BROMLEY. Now I call the attention of the Court to this —

Mr. STEFFEN (interposing). About that word "November", I think more of them are October licenses, are they not?

Mr. BROMLEY. They all became effective on November 5.

Justice STEPHENS. November will probably sufficiently identify them.

Mr. STEFFEN. So long as that is clear.

Mr. BROMLEY. I brought the subject up, if the Court pleases, not because I thought it had any great importance in itself, but I thought the time had come for defendants' counsel to state in the record that their silence did not indicate that they agreed with the Government's apparent position that if the Government succeeded in proving that these licensees signed license agreements with the hope  
1825 would likewise sign, and if one of the primary reasons for all of them doing it was to get stabilization through price control, that that made the resultant situation illegal. We do not admit that at all, we do not believe

it does. We think that all of these people, licensor and licensee, could, with perfect legality, have had as a reason for executing the November licenses the resultant price stabilization which price fixing would confer upon the industry, and that they all likewise could have determined that they wouldn't sign unless others signed, a substantial number or all.

And in that connection, I find no charge in the complaint that the mere fact that one of the compelling reasons was stabilization, and that another was that all would come under, made the resultant operation under the licenses illegal. That certainly was not the theory of the complaint, because the complaint, when it talks about price control, as I read it, only attacks price control in certain specific respects, that is, when there was no license in effect, no price-fixing provisions in effect, between August and November, 1929, when, as the Government alleges, the defendants attempted to fix resale prices; when, as the Government alleges, the defendants fixed prices when they weren't using the patents. So I find in the complaint only that kind of an attack upon our system, and not the attack which

Government's counsel now, it seems to me, is shifting  
1826 to, that is to say, that the mere fact that all of them took a license, hoping to gain benefits from price stabilization and wanting all others to sign, made an illegal situation.

I just wanted to make it clear on the record now that we did not admit that if the Government proved that, it rendered the licensing system illegal. We do not think it is the fact that these people were motivated by a desire to get price stabilization or had any agreement whereby they would sign only on condition that all signed, we do not think that is the fact and we shall continue to resist that. But even if it were proved, we do not think that it would result in the establishment of any cause of action by the Government against these defendants.

Justice STEPHENS. The Court has not interpreted the silence of counsel for the defendants on that subject as an admission of illegality.

Do you wish to say anything on this subject, Mr. Steffen?

Mr. STEFFEN. I think I will have to say a number of things to keep the record straight, Your Honor.

We, I take it, are not to argue at this time the law on the question of whether uniformity of action on the part of each defendant in taking out a license where they had in mind, individually, the idea of obtaining price control,

whether that does or does not constitute a violation of the Sherman Act. That is a matter which will be  
1827 postponed until final argument.

I would like the record to show very clearly that under the *Masonite* case and under the *Interstate Circuit* case, uniformity of action on the part of competitors in going into a combination where each individually had an idea of accomplishing a particular purpose, did constitute a clean-cut showing of a violation, of a conspiracy. In proving conspiracies, as Your Honor knows, and I think the Government's evidence here will show, it is necessary largely to build a case on circumstantial evidence, on declarations made at one time or another, and that all fits together at the end, as the Government will contend, to show a purpose to accomplish one or another of the matters which are illegal under the Sherman Act.

Now Mr. Bromley said that we were shifting our ground. That is a favorite device of counsel to say that the Government, or the other side, is shifting. I would like to make very clear right now, in answer to that, what we conceive these pleadings to be, and what they have always been, in respect to that matter.

The pleadings charge, in Paragraph 44 of the Complaint, broad violations —

Justice STEPHENS (interposing). Just a moment, let us get the Complaint so that we can read what you are referring to. Paragraph 44?

1828 Mr. STEFFEN. Yes, sir.

Justice STEPHENS. Proceed, Mr. Steffen.

Mr. STEFFEN. We state that the Complaint charges, in Paragraph 44, broad violations under the Sherman Act, and that that is the gist of the Complaint.

In Paragraph 45 we state the purposes of the combination. These purposes are stated to be of restraining, dominating, and controlling the manufacture and distribution of gypsum products in the Eastern area by (a), (b), (c), (d), and (e) in that paragraph.

(a) is the broad proposition that the defendants have conspired for the purpose of "Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold by said companies in the Eastern area".

And the bulk of our evidence will have to do with the concerted action on the part of the defendants to fix and maintain prices of gypsum board.

Now the defense in this case, as I think we are clear, is

that the *General Electric* case will protect the defendants from concertedly conspiring to fix prices and to restrain trade in that they had a patent, and that under that patent they had a license, and that under the license they had a price control feature, and that that will be a sufficient defense by way of confession and avoidance.

1829 We met that, in anticipation, in Paragraph 46. Paragraph 46 says—Yes, you had a patent license agreement, but it was a mere subterfuge. Your real purpose in this case was to fix prices and not to exploit a patent in the normal and usual way, in which case price fixing, if properly carried out and with proper instructions, and so on, might be a reasonable means, on the part of one licensor and one licensee, of protecting the patent, but that it distinctly can be, and we charge that their affirmative defense is, a mere subterfuge.

Let's take one matter which we had up yesterday evening, and that is that we haven't alleged in the remainder of the Complaint all of the evidence that we expect to produce to establish that these defendants did combine to fix prices and to use their patent licensing agreements as a subterfuge.

From Paragraph 47 on, we have alleged in great detail the evidence, much greater detail than is necessary, the evidence which we think establishes the principal charges made in Paragraph 44.

Now as Your Honor well knows, under the Rules, Rule 8 provides that:

"A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends. \* \* \*; (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

1830 So that the framework of this complaint is very simple. We have alleged jurisdiction; in 44 we allege the offense, which is a plain and simple statement of the claim; and over in the prayer for relief we have asked or demanded certain relief. That is all that is necessary in order to make a sufficient complaint.

Therefore, the evidence that we will be offering from time to time is evidence that goes back to 44. In large part—95 per cent of it—it will be evidence which we have already detailed in some measure in the paragraphs be-



ginning with 47. Therefore, the charge that we are shifting is utterly wrong.

Now Mr. Bromley also intimated that all we were trying to do was to show that they were price fixing illegally between that little period when the license agreements expired on August 6, and the time when the November agreements, or the October and November agreements, took effect on November 5. That isn't our case at all. We expect to show that, among other things. We expect to show that from the time they entered into these license agreements they were illegally fixing prices, straight through, not just

on an occasional time when there was no price-fixing agreement in the license, and not just a case where they were fixing prices on resale. We expect to

show that this is illegal, cold, in that it provides for a control of prices on resale. But that is only a part of the case.

Now may I go back to the record for just a moment?

Justice STEPHENS. Have you anything more on this subject, Mr. Bromley? Do you wish to make a reply?

Mr. BROMLEY. Yes, if the Court pleases.

The last sentence on page 11 of the Complaint, at the end of Paragraph 46, says: "The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof."

Now if Your Honors will go back to paragraph 45, subdivision (a), on page 10, to which my friend adverted, just the opposite page, in which there is the general allegation, "Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured \* \* \*", now there is a general statement which is later in the Complaint made perfectly specific, and it is made perfectly specific by the sub-head above paragraph 96, on page 25, which is entitled, "Concerted control of prices and methods of distribution of unpatented gypsum products".

And over the page and down through paragraph 107, each instance of control of prices is specified and alleged

in accordance with what I have said I believe. The little period is specifically alleged in paragraph 97,

the period from May to November, 1929. And then in paragraph 100 it is alleged that from November 1929 to October 1935, the licensees weren't using the patents, and therefore the price fixing was illegal.

And in paragraph 102, it is alleged that from October 1935 to the date of the Complaint —

Justice STEPHENS (interposing). Paragraph 102?

Mr. BROMLEY. That should be paragraph 101, I am sorry. (Continuing) that a substantial part of the board produced was not covered by the patents, and therefore, of course, price fixing wouldn't be lawful.

Now it doesn't do any good to refer to these general allegations at the beginning of the Complaint and say, "Well, that covers everything you can think of" when, as a matter of fact, the pleader was almost as meticulous in preparing the pleading as he would have been if he had been preparing a bill of particulars, and he alleged specifically just what concerted raising and fixing of prices he was talking about. And I don't believe that the allegation in paragraph 46, to the effect that the combination was entered into and carried out under the guise of numerous license agreements, in the light of what is alleged subsequently, was ever intended or can now be said

to mean that because somebody thought price control was a good thing, and somebody wanted other companies to come into it, that that made the scheme illegal. I think that allegation is one which has commonly appeared in other suits where there wasn't any intention to use the patents at all, where the patents weren't the thing that the companies wanted, they didn't amount to anything, but they just framed up a scheme to get a patent on something in order to fix prices.

Of course, they are trying hard to prove that, but I don't think that is the same thing as to say that because some of the licensees were thinking that they would like to go into this because it would stabilize their prices, and because others would go into it, that the Government intended to allege those two facts as a reason to make the whole scheme illegal. I don't think they have so alleged them.

Mr. STEFFEN. May I make just one statement? Practically all of Mr. Bromley's argument now, in its reference to page 25 and the paragraph following, of the Complaint, following paragraph 96, relate to unpatented gypsum products, and there is an allegation in here that the defendants not only have sought to fix the prices of all board, including and principally the patented board, but the paragraphs beginning with 96 contain allegations that they have attempted to fix the prices of unpatented board. That is what it says, for unpatented gypsum products. Therefore, all of that is a further allegation.

1834 I don't think there is any matter up at the moment —

Justice STEPHENS. (interposing). There is nothing be-

fore the Court calling for a ruling at the moment. Nevertheless, the Court is glad to have these statements, which advise the Court of the contentions of the parties under the pleadings, and they may be helpful to the Court when a ruling is required.

The Court will make this statement, Mr. Steffen, with respect to your position, so that you may be advised of it: I, myself, speaking for myself at least, have grave doubt as to the correctness of your statement that you have pleaded a part of the evidence but weren't required to plead all of it. It doesn't seem to me that you either were allowed to plead evidence or that you did plead evidence, in the paragraphs of your Complaint which follow paragraphs 44, 45 and 46. As the Court read the balance of the Complaint, the Court understood it to be not allegations of evidence, but allegations of ultimate fact.

Mr. STEFFEN. I think that is correct, yes.

Justice STEPHENS. I don't raise that point captiously at all. I make the point for the reason that it seems to me there may be something to the contention of defendants' counsel that if those are the ultimate facts upon which you are relying, you are bound by them, in the absence of an amendment. The Court has understood the theory 1835 of the Government's case, generally stated, to be that the price fixing which is attacked had, in the large, two aspects: (1) the alleged price fixing during an interval when the licenses were not in effect, and (2) all of the price fixing which occurred under the licenses, on the theory that the licenses themselves were just subterfuge. And the Court has regarded the detailed statement of the Complaint following the paragraphs, that I mentioned, 44, 45 and 46, as a definition of the ultimate facts and not of the evidence.

There was, I think, one exhibit before the Court at the close of the session, on which some question was raised as to relevancy. Is there a suspended ruling on that, or are we ready to proceed?

Mr. STEFFEN. May I go to the record, and I think I can save time.

Justice STEPHENS. Yes.

Mr. STEFFEN. Your Honor stated this morning, in connection with one piece of testimony on page 2056, that you did not understand it.

Justice STEPHENS. Oh, yes.

Mr. STEFFEN. The witness there said: "I would say my answer would be the same as to your question, plus other.

advantages in working under the patent."

Now Mr. Bromley has referred Your Honor back to the testimony where the witness said, "plus other advantages", and that was on page 2049.

Justice STEPHENS. What puzzled me about it, Mr. Steffen—maybe I can shorten that—was this: The witness says:

"I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now looking back to your question, the second question from the bottom of page 2055, which is what the witness is apparently referring to, it says:

"By Mr. STEFFEN.

"Q. You use the words in your letter here, 'and in the interest of harmony in the industry'. Was that a consideration?

"A. No, sir; I don't think so.

"Q. There in that third paragraph.

"A. I would like to correct that. I would say my answer would be the same as to your question, \* \* \*"—I don't know what he means by that.

Mr. BROMLEY. I suggest we ask him over again.

Mr. STEFFEN. I will ask him over again.

Justice STEPHENS. Very well.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed).

Mr. STEFFEN. I would like to refresh him.

Justice STEPHENS. Yes, you will have to refresh him. I may be dull about this. My colleagues apparently understand the situation, but I don't.

Justice GARRETT. He was asked, "You use the words in your letter here, 'and in the interest of harmony in the industry'. Was that a consideration?"

He says: "No, sir, I don't think so."

And then you called his attention to that language there in the third paragraph, and after reading it he said, "I would like to correct that."

I interpret that to mean,—“I would like to correct the answer, 'No, sir, I don't think so.'”



Justice STEPHENS. Yes, I understand that he is correcting it, but I don't understand what he corrected it to mean.

Mr. STEFFEN. He goes on and says, "I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now I think we ought to get the witness' present statement on the matter.

Justice STEPHENS. Do you understand what this is all about, Mr. Brown?

The WITNESS. Your Honor, I think I do, yes, sir.

1838

By Mr. STEFFEN.

Q. I will show you, if you would like to see it to refresh your recollection, Government's Exhibit No. 228, which was the exhibit concerning "plus other advantages in working under the patent".

I first asked you what you meant by "plus other advantages in working under the patent", appearing at the top of the second page of that exhibit.

A. I referred to the answer being the same as to a previous question in which I stated that the answer was price stabilization and price control, and I corrected this to make the same answer in this case.

Justice STEPHENS. Very well.

Mr. STEFFEN. Thank you, Mr. Brown.

Justice STEPHENS. That clears it up. Thank you, Mr. Steffen and Mr. Brown.

You may proceed, gentlemen.

Mr. STEFFEN. I think Exhibit 238 was before the Court, and there was a question of —

Justice STEPHENS (interposing). Relevancy.

Mr. STEFFEN (continuing). Of why we considered it admissible.

In part, I think we have cleared the air a little with our discussion just now concerning the Complaint, and the nature of the Complaint, but I think I must make a short statement to show why we consider this relevant.

1839. As I said earlier, we consider that the gist of the Government's Complaint is paragraphs 44, 45, and 46. Under paragraph 44 we allege violations of various sections of the Act; under paragraph 45 we allege that they were done with the purpose and intent of dominating and controlling the gypsum industry by: (a) fixing high and arbitrary prices; and in paragraph 46 we say that it was done under the guise of patent license agreements.

Now this, as we see it, is a declaration of a co-conspira-

tor. Mr. Bromley has told the Court that the two witnesses who represented USG from the beginning until today were Mr. MacLeish and Mr. Avery, they have been through this from the beginning to the end. They were not only conspirators but arch-conspirators, according to the Government's contention.

Now we have here, as we construe it, an allegation or a declaration by Mr. MacLeish, who is, as I say, one of the conspirators. Mr. MacLeish says what? He says that, "In drafting this agreement it seemed to me that the time might come when this patent should be included in our general license agreement"—we expect to explain that that would be in the general license agreements which were executed in May and November—"as we might later want the right to fix prices included in our license to use this patent."

1840 Now it is the Government's contention that the defendants have agreed and conspired and that they have fixed prices and they have restrained commerce. It is the defendants' contention that they were justified under the *General Electric* case. It is the Government's contention that that is a subterfuge. Now in order to show whether they were using their patents or not using their patents as a subterfuge, we are entitled to introduce all declarations of any conspirator which gives an inkling as to whether they were really wanting to license people under these patents and to protect the patents, which so far has not appeared very much, or whether they wanted to use the patents for the purpose of gaining price control. If that is what they wanted, rather than merely a legitimate exploitation of their patent privilege, then their case falls completely to the ground.

Here is a declaration by a co-conspirator which you may construe as you like, but which we construe to mean that his primary interest here was to get this patent so that it could later be incorporated into the agreements, if need be, and constitute a basis for price fixing.

Now Mr. Bromley suggested yesterday that we hadn't established that they did write it into the agreements, and of course we say that that is immaterial for the present purposes. The cases under the Sherman Act are very clear, that you need not show that they actually restrained commerce. All you need show is that they conspired, 1841 that they intended to.

I cite you the *Nash* case, which is a United States Supreme Court holding in *Nash v. United States*, 229 U. S.

373, where they said that the Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability \* \* \*"

And that is settled law, so far as the Sherman Act is concerned. So that it wasn't necessary to show that they went on, wrote this into the agreement, and then thereafter fixed prices on it and restrained trade. What we want to do is to show what these defendants intended to do. If we could put on evidence showing that Mr. MacLeish made a declaration that he would like to get some more patents so that he could write them into the agreement and fix prices all the more surely, would defense counsel contend that that wasn't a declaration that would be admissible, and could he argue that merely because we didn't show that he did get those patents and did put them in the agreement, that it was immaterial?

Now as a matter of fact, in this case, and I think we ought to make it very clear, when they came to the perforated lath agreement they there had a patent, No. 1,938,354, covering the perforated lath invention, as Mr. Bromley says, and they issued patent license agreements, various of the defendants took out those licenses; then, in 1938, when difficulties developed and they found that 1842 they could no longer, or wanted no longer to collect a royalty on it, they granted gratuitous licenses to those licensees. They accepted those gratuitous licenses. Those gratuitous licenses, which are in evidence and will be construed by the Court, as we understand it, provided that those patents, that is, particularly Patent 1,938,354, became a part of the original agreement between the licensor and licensee, and was subject to all the terms and conditions of the original agreement, including price control, which, as we contend, indicates a very definite purpose to increase as much as possible the patent log in the back of their agreements to make it all the more sure that they could sustain a case of this sort, that they had strong patent backing.

Now we say this is a declaration. I think there can be no question but what it has some probative value. I think it is clearly relevant and clearly material, and I am very sure the Court could make no error in admitting it. The general rules today are to admit things that are properly identified, and that are relevant in some measure, or material.

I thank you.

Justice STEPHENS. Mr. Bromley, do you wish to be heard?

Mr. BROMLEY. Well, I have listened carefully, but I do not understand what his purpose can be. If you will read the third paragraph of the letter, it seems to me 1843 that it only states what any careful lawyer would be bound to state. The second sentence, beginning "This could not be done",—I should think a careful lawyer, who every time he licensed a patent, if he wanted to think about all future eventualities, might very well determine to reserve the right to fix prices, because if he didn't reserve it he couldn't do it thereafter.

Now here is a situation where we never did fix prices under the patent, and never put it in the general license. How can it be material to anything?

Mr. STEFFEN. I might say that that last statement is a matter not in evidence one way or the other.

Mr. BROMLEY. Well, it is in evidence, Mr. Steffen, as I demonstrated to you yesterday. All you have got to do is take your license contracts that are in evidence; each one of them has a schedule of patents, by number, which are licensed, they are specific schedules, they describe the patents and list the inventor's name and give the number; and you can tell whether Patents 1,725,243 and 1,709,475, referred to in the first paragraph of Exhibit 238 for Identification, are or are not in the November licenses. I say they are not.

Mr. STEFFEN. I would say clearly they were not there, but whether there were other agreements has not been established. You were asserting that, as I understood 1844. stood it.

Justice STEPHENS. On this particular point that you are now mentioning, Mr. Bromley, this idea occurred to the Court in thinking the matter over during the recess. Suppose, to take a simple illustration, defendants were charged with conspiring to incite a riot, and it was offered to prove that they had caches of ammunition at various places in the vicinity of the alleged riot; that they were put there for the purpose of being used in the riot. Would it be irrelevant to prove that one of those caches of ammunition did exist, even though it was not actually used in the riot?

Mr. BROMLEY. No, sir, it would be relevant.

Justice STEPHENS. Would it not be some evidence of an intent to riot that they had that additional cache of ammunition, even though it wasn't actually used?



Mr. BROMLEY. Yes, sir, I think it would be.

I think my position must be that that is not a good analogy, because certainly I can not quarrel with Your Honor's obvious conclusion that both of those facts would be relevant and material. I think they would be. But I don't see what relevancy it has to prove that this company, or its lawyer, for years prior to the licenses or subsequent to the licenses, every time it got a patent and licensed it to anybody, in a situation not under attack, reserved the right to fix prices.

1845 Now suppose this company had done that for years prior to these November licenses, and had done it for years afterward, as to inventions, however, which are not concerned in this suit. Can it be urged that Mr. MacLeish should be judged as to whether he is a conspirator or not, by the fact that he was of a price-fixing mind, because as a lawyer he always reserved the right to fix prices?

Now it seems to me that goes too far. I don't believe you could prove in the riot situation that years before, these people who were indicted for inciting a riot, talked about inciting other riots, or even had caches of ammunition stowed away for other riotous purposes, years before or afterwards.

I think that is just where the line should be drawn. You have got to show some connection with the riot in connection with which they are indicted. I don't believe that the Government would have any right to prove that it was Mr. MacLeish's practice to do this every time the company got a patent and it was referred to him and licensed to somebody else, if those situations were not being attacked by the Government, as they are not here.

Justice STEPHENS. In other words, you assert the proof asserted by the Government to exist in this Exhibit 238, to be somewhat like the attempt to prove in a criminal proceeding that a defendant had committed past crimes or had a tendency to commit past crimes; that that  
1846 is really irrelevant to the present issue?

Mr. BROMLEY. Yes, sir, I do, and I think it is.

Of course, I am reminded that the riot analogy lacks this element of similarity: The riot is admittedly, per se, illegal. Here we have a situation, i. e., price fixing under a patent, which is, per se, legal. So that I don't believe you can convert price fixing under a patent, which is perfectly lawful and legal as the law stands today, into an illegal situation by attempting to prove that one of the

co-conspirators always desired to fix prices under every patent.

Justice STEPHENS. Well, of course, as to that, the analogy may have been a rough-cut analogy, but perhaps your response to it is not quite accurate either, Mr. Bromley, in that here it is charged that this price fixing is illegal because entered into as a subterfuge, and not really in protection of the patent monopoly; and each party, under familiar theories, is entitled to introduce evidence to prove his theory of the wrong involved. So it may be that there is some possible relevance in the exhibit.

Let the Court read it again.

The view of the Court is that the exhibit may have some slight logical relevance in view of the general charge that the license agreements were a subterfuge. The Court will state frankly, Mr. Steffen, that it seems that the exhibit is very close to the line of exclusion because 1847 of slight weight. Evidence may be technically relevant in the sense that it has a logical relationship to an issue, and yet has such very slight weight that its remoteness makes it inadmissible.

We are frank to say to Government counsel that we think that particular exhibit is very close to that line. Nevertheless, we think it does have possibly a technical relevancy, and we will not exclude it.

It is received in evidence.

(The document referred to, marked Government's Exhibit 238, was received in evidence.)

Mr. STEFFEN. I might say that occasionally an item having slight weight when it is introduced, becomes more significant as the trial proceeds.

Justice STEPHENS. It may be connected, we understand that.

Thank you gentlemen for the helpful statements you have made on all these topics.

Now shall we proceed to further examination?

By Mr. STEFFEN.

Q. I want to take up another subject, Mr. Brown.

Do you recall having had any negotiations with the USG on behalf of Certain-teed, concerning a plant at North Holston?

A. Yes, sir.

1848 Q. What was the plant at North Holston?

A. It was a gypsum plant.

Q. Do you recall about when you had negotiations with USG?

A. I don't remember the date, no, sir.

Q. What was the nature of the negotiations?

A. To purchase plaster from them.

Q. Did it include the purchase of any other items besides plaster?

A. I think it did, I think it included board and lath, but I am not sure of all of the items covered.

Q. Did the Certain-teed people have a mill at North Holston?

A. No, sir.

Q. Did they have a plaster mill there?

A. They had one at Plastergon, Virginia, as I remember the point. I have it down wrong, I am sorry.

Mr. BROMLEY. It was Plasterco, wasn't it?

The WITNESS. Yes.

By Mr. STEFFEN.

Q. What was the purpose of the agreement to buy plaster from USG, if you had a plant there?

Mr. ADAMS. I object to that. The agreement will speak for itself if it is introduced.

Mr. STEFFEN. We will introduce this agreement, but these continual objections that the agreement 1849 speaks for itself, of course, are out of place where we want to show purpose, and in a conspiracy case certainly we are entitled to show the purpose, intent and feeling of the individuals. The cases are many on that point. We are not construing the contract. We will introduce the contract in a minute.

Justice STEPHENS. The Court has ruled that where an agreement is in evidence, the meaning of the agreement must be learned from the agreement and not from the witness, but the Court has not ruled that counsel can not inquire into the reasons for entering into an agreement, so far as they may relate to alleged intent to violate the antitrust laws.

Mr. ADAMS. Even under those circumstances, Your Honor, we respectfully suggest that this question is bad as to form, and if counsel wants to prove the purpose of something I ask that he should be required to prove what happened.

Justice STEPHENS. Well, the Court thinks that interjection on the defendants' part may be correct, Mr. Steffen. The Court was going to suggest this morning, when an

opportunity arose, that it seems to the Court we could save a good deal of time in interruptions and perhaps in the examination if Government counsel, who will be examining witnesses a great deal from now on until their case is completed, would proceed a little more specifically. The Court does disagree with counsel in respect to this practice

—first, asking a general question, and then following it up with a specific question. It seems to the Court that the conventional practice which we ought to follow here is, where you are dealing with conversations or discussions, to ask the witness if he had a discussion first, find out if he had one (and then find out approximately when it took place and who it was with; and then ask what was contained in it.

Here, also, it would seem to the Court that you might better, in a preliminary way, inquire of the witness whether or not he knows the purpose of going into the agreement, because if he doesn't know there is no need of taking your time or our time in pursuing the examination.

Objection sustained as to form; overruled as to substance.

By Mr. STEFFEN.

Q. Do you know the purpose of your negotiations with USG concerning the North Holston plant?

A. Yes, sir.

Q. What was the purpose?

A. We could buy it cheaper than we could make it.

Q. And what did you intend to do with the North Holston plant?

A. Shut it down.

Q. Did you shut it down?

A. Yes, sir.

Q. You stated, I think, that you didn't recall exactly the date of your negotiations with the USG?

1851 A. No, sir.

Q. I now show you Government's Exhibit No. 239, marked for Identification —

Justice STEPHENS (interposing). Is that in this file, Mr. Steffen?

Mr. STEFFEN. It follows the two contracts which I am passing over for the moment.

Mr. KNUFF. It is a telegram, Your Honor.

Mr. STEFFEN. It purports to be a telegram from C. O. Brown to Mr. Whittemore, under date of May 4, 1932.



Justice STEPHENS. I have it, thank you.

1852

By Mr. STEFFEN.

Q. Did you send that wire, Mr. Brown?

A. I don't remember, I assume I did.

Q. Are you familiar with the matter discussed in the wire or stated in the wire?

A. Yes, sir.

Q. Does that accord with your recollection of what took place?

A. Yes, sir.

Q. Do you recall whether you sent a wire at some time to Mr. Whittemore on this matter?

A. I don't recall the wire, no, sir.

Q. I now show you Government's Exhibit No. 240 —

Justice STEPHENS (interposing). Who was Van Hagan, Mr. Steffen?

Mr. STEFFEN. Production man for Certain-teed.

Mr. ADAMS. In the Gypsum Division.

Justice STEPHENS. Thank you.

What is Exhibit 240?

Mr. STEFFEN. It has not been identified as yet, your Honor. It purports to be a handwritten memorandum signed, "Claude" and addressed to, "Dear AW".

By Mr. STEFFEN.

Q. I would ask you, Mr. Brown, if you recognize that handwriting, and do you know who "Claude" is?

1853 

A. I wrote it.

Q. Could you tell about the date?

A. If it isn't on here I couldn't, no, sir.

Q. Well, look at the initials at the top and tell us if you know who those initials belong to?

A. It looks like Mr. Whittemore's writing.

Q. And do you notice the figures 5/2/32 appearing after Mr. Whittemore's initials?

A. Yes, sir.

Q. Could that have been the approximate date?

A. I would take it that would be approximately the date.

Q. I now show you Government's Exhibit No. 241, which purports to be a contract between Certain-teed and United States Gypsum Company under date of July 1, 1932, and I ask you to examine it and see if you recognize that as a contract which you signed.

A. Yes, sir.

Q. Is that the contract referred to in your communication to Mr. Whittemore?

Justice STEPHENS. The Court is a little confused, perhaps because I misunderstood one of the words of the witness. I understood him to testify that the purpose of the negotiation was to buy a plant at Plasterco. Did he say that?

Mr. STEFFEN. Will you explain that?

The WITNESS. To buy gypsum products, I should have said.

1854 Justice STEPHENS. I misunderstood you, that makes it clear.

By Mr. STEFFEN.

Q. And as I understood you, you were planning to close the plant, was that your testimony?

Justice STEPHENS. Close your own plant?

The WITNESS. Yes.

Justice STEPHENS. But to buy the products from someone else?

The WITNESS. Yes, sir.

Justice STEPHENS. From USG?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Will you examine the contract and see if that refreshes your recollection as to whether you were proposing to buy board also from USG?

A. Yes, sir, it indicates that we were going to buy board.

Q. Well, is that your recollection?

A. Yes, sir.

Mr. STEFFEN. I might state, your Honor, that there will be a series of exhibits next, and I would like to introduce them all after I have laid a foundation, all at one time.

Justice STEPHENS. You may.

Mr. ADAMS. May I inquire if this series of exhibits is going to have to do with this transaction only, because if the series of exhibits is going to deal with other

1855 transactions, I want to object to this now.

Mr. STEFFEN. It will have to do with this and related transactions. It will take me just a few moments, I think, to get them identified and lay the foundation.

Mr. ADAMS. Well, I don't want to interfere with counsel's presentation of the case, but I certainly want to object to him going into anything beyond this contract before it

is determined whether or not it has any relevancy or materiality to this inquiry at all. I do object, if it is proper to object at this time.

Justice STEPHENS. Well, this is largely a question of order of identification of items. We assume that Government counsel will not go beyond proper limits. If counsel has a series of exhibits which relate to each other and explain each other it might be well, in the interests of time and convenience, to have them marked and identified, and offered all at once. Otherwise they cannot be explained very well when the question of relevancy occurs.

You may proceed, Mr. Steffen.

By Mr. STEFFEN.

Q. Do you recall whether you had further negotiations with USG concerning this contract or the operation of your North Holston plant?

A. I recall no negotiations after the contract was signed.

Q. Did you have any further communications 1856 with USG concerning that matter?

A. I don't remember.

Q. Did a time come when you were accused of having reopened the North Holston plant, do you recall?

A. The time came —

Mr. BROMLEY (interposing). Wait a minute. I object to the form of the question.

Mr. STEFFEN. The question is leading and purposely so.

Mr. BROMLEY. It is worse than that. I object to the conclusory word, "accused".

Justice STEPHENS. It would be more proper if counsel were to ask if there came a time when a question arose with respect to the reopening of that plant.

By Mr. STEFFEN.

Q. Will you answer the Court's question please?

A. There was such a question which came up later.

Q. Do you recall what the question was?

A. As I remember it, it was whether or not the plant was in operation.

Q. And who raised the question?

A. The United States Gypsum Company.

Q. What was their position?

Mr. BROMLEY. I object to this as entirely immaterial and incompetent and irrelevant, and I move to strike out all testimony with respect to the North Holston 1857 plant. It seems to me the examination has gone

far enough to indicate what the line of inquiry is, and it also seems to me that before counsel proceeds further he ought to state, if he can, what it is in the complaint to which this transaction could possibly have any relevance.

Here is a contract in writing, executed, between the parties, by which Certain-teed agreed to purchase materials in a certain area because it desired to close down its plant during a period of depression. And that is all there is to it. There is no price fixing in the contract. It hasn't anything to do with anything that is charged in the complaint, and certainly it is not mentioned in the complaint, even by the most indistinct indirection. It seems to me to be utterly and completely immaterial.

Justice STEPHENS. What is Government's contention as to the relevancy of this line of inquiry?

Mr. STEFFEN. I had expected, as I asked the Court's permission so to do, to introduce further contracts—this is not the only one, there were three others—where they closed down one mill or another of the Certain-teed Products Company, and contracted to buy, as I think the contracts establish, not only plaster but board from the United States Gypsum Company, and then of course to resell the board.

I am entitled, I think, to go into the question of their resale of the board which, as I understand it, was 1858 at bulletin prices, and it all fits in as a matter of resale price control.

Now if you would like to have my full statement on relevancy at this time, before I have gone into this additional matter, I will be glad to make it.

Justice STEPHENS. It would seem desirable that you do so, so that we will be advised as to the Government's position, since serious objection is raised by the other side.

Mr. STEFFEN. Well, I will call your Honor's attention—I think probably the quickest way of getting at it is to look at the complaint —

Justice STEPHENS. Perhaps it would be advisable, Mr. Steffen, to take the usual recess at this time.

Mr. STEFFEN. Very well.

Justice STEPHENS. We will take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

1859 Justice STEPHENS. Proceed, gentlemen.

Mr. BROMLEY. May it please the Court, it seems to me that Exhibit 238 should have been objected to by me on the usual grounds, for the benefit of all defendants. I



failed to do that by inadvertence. May the record show that I do so now.

Justice STEPHENS. The record may so show, and the exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. May it please the Court, our question, I believe, is as to the admissibility of certain contracts whereby the Certain-teed Products Corporation agreed to, in effect, close their mills and buy their necessary production of both plaster and wallboard from the United States Gypsum Company, and the question comes up as to whether that is proper under the complaint.

Now just as we were taking the recess, I was calling your Honor's attention to page 69 of the complaint. I do that because that is an agreement, and I can show you, if you wish, the Certain-teed-United States Gypsum agreement. But this is the October agreement between the licensor and all the licensees.

On page 69 you have the price-fixing provision of the contract, and I want to ask your Honor to give very careful attention to that price-fixing clause, because much of the relevancy of this evidence comes in under that clause. I

will read very carefully the paragraph beginning 1860 with, "It is expressly understood and agreed"—

Justice STEPHENS (interposing). What license contract is this?

Mr. STEFFEN. This happens to be the Ebsary license, but it is admitted in the pleadings that the Certain-teed agreement is substantially the same.

Now if your Honor would prefer, we could get the original—

Justice STEPHENS (interposing). No, it is a license agreement between one of the defendants and the United States Gypsum Company, it is one of the group of license agreements of which the Government is complaining here.

Mr. STEFFEN. Yes, and in this respect it is identical with the license agreement between the United States Gypsum and Certain-teed.

Justice STEPHENS. You may read it.

Mr. STEFFEN. I will read, omitting certain parts:

"It is expressly understood and agreed that the . . . Licensor shall have and it hereby reserves the right to determine and fix at any time and to change from time to time during the existence of said patent and so long as said license shall continue, the minimum price or prices at which

Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee by use of any of the machines or appliances . . . and which shall embody the inventions and improvements set forth and claimed in any of 1861 said patents which are presently issued (that is the first clause—now watch) or any of said plasterboard or gypsum wallboard manufactured by second parties . . .”

Justice STEPHEN. The “second parties” are who?

Mr. STEFFEN. That is a matter that we will discuss. In answer to your question I would say that “second parties” means, necessarily from the construction of the contract, any other manufacturer, obviously. The contract is drafted as a contract between licensor and licensee, there is no first party or second party. “Second parties” is in the plural. “Second parties” means, therefore, any second party and of course as a matter of construction, the parties understood that they would buy gypsum board either from USG, as they did in this case, or from any other manufacturer of gypsum board.

Now you will note that it contemplates that USG shall be entitled to fix prices on all board manufactured by licensees, and as well on all board manufactured by second parties which the licensee in this contract shall resell.

Now the defendants are not going to like this, but the cases are very clear and they know them, that a contract which provides for control of resale prices is illegal. There is no argument at all on that matter. In our trial brief, under the heading of “Resale Price Control”, we cite the basic cases, the Dr. Miles case, and several cases, which provide that if your contract calls for a control of 1862 resale prices that you have a contract which is, per se, illegal.

Now this was not a single contract. I mean this same device appears in the perforated lath contract and in the metallized board contract, and in order to get this clearly before you I would refer you to page 123 of the complaint, having to do with the perforated lath contract. There the contract is very much broader. In other words, they weren't quite as explicit, but they covered even greater territory in allowing the licensor to control the price of the licensee, and I will call your attention to paragraph 2 appearing at the top of page 123 of the complaint, which relates to the perforated lath contract.

Now here the critical words appear about six or seven

lines down where it says that the United States Gypsum Company, the "Licensor reserves the right to determine, change and/or withdraw at any time and from time to time, during the term of this agreement, the minimum price or prices and/or terms and conditions of sale at which Licensee shall sell or offer for sale any such perforated plasterboard lath \* \* \*"—and it doesn't say there, "manufactured by or purchased from second parties." It says that any board which you people sell we are going to fix prices on, at least we reserve the right to fix prices on it. The contract is, per se, illegal.

Let's look at the metallized board contract. If you will notice on page 112 of the complaint, paragraph 1863 (a), it states "that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said Roos Patent \* \* \*"

In other words, they may there fix the price on any plaster board which a licensee might sell.

Now we are going to offer, during the course of the day, evidence indicating that the licensees, under the metallized board license agreement, did take out a license, manufacture nothing, and then proceed to buy from USG or from National, their board, and then sell it at bulletin prices.

Now that is a clear-cut violation, as we see it, of the Sherman Act.

I will now go to the question of allegation. It seems to me beyond question that this complaint, which is based upon these agreements, which charges a price fixing in restraint of trade, has sufficiently charged those provisions of the contract as being in violation of the statute. The thing is right before everybody.

Now the evidence that we are now offering is evidence to show that they carried it into effect. As I said to your

Honors this morning, the contract, whether they 1864 ever used it or didn't use it, can be illegal, and we will, at the proper time, ask to have the Court declare it illegal and have it cancelled, in that respect at least. Whether they used it or didn't use it, the contract is illegal in its terms.

Now if, in addition to that, the defendants proceeded to

buy from the licensor or another licensee, and then to sell at bulletin prices, we have a case, an aggravated case, where they not only had this contract, but they carried it into effect.

And I would call your Honors' attention to the fact that if, at the conclusion of this case, the decision is for the Government, it will be necessary of course to know the extent and how aggravated the conspiracy was, what it accomplished in the industry, and evidence of the sort here sought concerning the effect will be very material to your Honors in reaching a decision as to how far a decree for the Government should go, if you reach that decision.

Justice STEPHENS. Mr. Bromley?

Mr. BROMLEY. May it please the Court. I must say at the outset that I never expected to hear this argument made in this or any other court. This matter was all explained to Mr. Kelleher in the criminal case. This is a typographical mistake. On page 69, the phrase "second parties" should be "licensee". Mr. Kelleher knew that, the Government knew that. No contention of this sort was made in the criminal case because, of course, if made it would 1865 have ended the criminal case against us.

That was the case in which the indictment charged that we fixed resale prices, and if we had agreements which provided, as my friend seeks to say this one does, that we had the right to fix prices on wallboard manufactured by second parties, that would have ended the matter.

Now these contracts were copied from the Universal contract, or followed the Universal contract. There were three parties to the Universal contract, the company, the receivers and the licensor, and Mr. MacLeish will testify, and Mr. Kelleher was readily convinced, that in drafting this Ebsary contract, instead of saying "licensee" the phrase "second parties" was put in, but it never was intended to provide as it reads, it was a typographical mistake and the Government in the criminal case did not make this argument at all, and said, "Of course we make no contention that the contract is illegal on its face"—and we would be absurd to come in here contesting this if this provision meant the way it reads, and were it not that we know it is a typographical error, as the Government knows.

Now, as further evidence that they do know, where is there any charge in the complaint that the contract is illegal on its face? Well, if that were their contention, all they would have had to do is allege it. But you can search



the complaint from beginning to end and you can-  
 1866 not find any suggestion that when they drew it they  
 relied on the theory that this little phrase, "second  
 parties", meant what they now say it means. There is no  
 charge in the complaint that covers it at all. That is why  
 he didn't point to anything in the complaint, but chose  
 rather to pick out this typographical mistake on page 69

Now he refers to page 123 of the complaint which is  
 another license agreement. I don't know what he refers  
 to it for, but I think he thinks it bolsters his argument.  
 Of course he overlooks entirely the little word "such" which  
 appears at the beginning of line 8 of paragraph 2, "the  
 minimum price or prices and/or terms and conditions of  
 sale at which licensee shall sell or offer for sale any such  
 perforated plaster board lath. \* \* \*"

Justice STEPHENS. Where is that, Mr. Bromley?

Mr. BROMLEY. Page 123 of the complaint, line 8 of para-  
 graph 2.

Justice STEPHENS. Yes, I have it.

Mr. BROMLEY. Now, "such perforated plaster board  
 lath" is patented board manufactured under the patent. It  
 plainly was meant to apply, and plainly does apply, only  
 to the sale by somebody who has manufactured the board  
 under the patent. It is perfectly simple and perfectly easy  
 to interpret. Again, no contention is made in the complaint  
 that this is an attempt to fix the resale prices, and there-

fore illegal, per se and on its face. If that conten-  
 1867 tion had ever been made, we wouldn't be here trying  
 all these factors to show that there was something  
 illegal about the license agreement. Nobody has ever, be-  
 fore today, suggested that these license agreements are  
 illegal on their face because they attempt to extend price  
 control beyond the price which the manufacturer shall  
 charge when he sells patented goods. Now that is not  
 alleged in the complaint and has never before been men-  
 tioned by the Government.

Likewise on page 112, where he makes the third and final  
 reference in paragraph IV (a), he referred to the eighth  
 line, "the minimum price or prices at which Licensee shall  
 or may sell plaster board having a metallized surface which  
 is covered by said Roos Patent \* \* \* "Which is covered"  
 means which is made by the person who sells it under the  
 Roos patent.

Again there is no allegation in the complaint that the  
 metallized lath license is unlawful on its face, or that its

provisions extended price control beyond the sale by the licensee who made it under the patent.

So I say I am shocked by any such argument as this at this time.

Justice STEPHENS. Where is this Universal agreement from which the Ebsary agreement was copied?

Mr. BROMLEY. It is Exhibit 6.

1868 Justice STEPHENS. That is the Ebsary contract.

Where is the Universal contract from which this agreement was copied?

Mr. COLLINS. It is Exhibit 6, Government's Exhibit 6 in this case.

Justice STEPHENS. It isn't in the complaint.

Mr. BROMLEY. No.

Justice STEPHENS. I have it.

Where is that phrase, "second parties" in this complaint?

Mr. STEFFEN. On page 69 of the complaint, your Honor, which is the Ebsary agreement, the middle of the first full paragraph.

Justice STEPHENS. Will you point out to the Court, Mr. Bromley, the comparable language in the Universal agreement to the language in the Ebsary agreement on which counsel for the Government relies? The Court notes in the introduction to the Universal agreement with Holland, and the United States Gypsum Company, that there are three parties, first, second and third parties.

Now where is the language in the Universal agreement which parallels the language on page 69 of the complaint, in the Ebsary agreement?

Mr. BROMLEY. It is on page 14, paragraph 6.

Justice STEPHENS. Well, do you contend now, Mr. Steffen, that that is other than a typographical error?

Mr. STEFFEN. Yes, I do.

I will say I am just as much surprised as Mr. 1869 Bromley purports to be concerning the matter, because I have examined carefully the Certain-teed agreement which is in evidence, and which is the agreement which the Certain-teed Company and the United States Gypsum Company had been operating under, and it is identical, as I stated to the Court, in this respect, with the Ebsary agreement which I read.

Mr. BROMLEY. That is right.

Mr. STEFFEN. May I finish, Mr. Bromley.

And the pleadings, as I have examined them, make an admission that the Ebsary agreement is correct, but that

the defendants would like to revert to the original for purposes of examination at the trial. The original is now in.

The pleadings, as I understand them, are these. We have alleged that they entered into license agreements of the sort set out on page 69, that they do specify that they can fix prices on goods purchased from second parties, and that they have admitted it. The thing stands right there, as respects the pleadings.

Now I am frank to say I don't know of anything at the criminal trial that had anything to do with this. The criminal case, as I understand it, the indictment in that case, had to do with resale prices by jobbers and distributors. This question was not raised at the criminal trial, it had nothing to do with it, as I understand it, and

therefore any statement—which I do not concede  
1870 was made—that it may have occurred in Mr. Bromley's talk with Mr. Kelleher, I think has nothing to do with it.

The appropriate time, if there was any such question, was for defendants to have raised it in their pleadings. They have had three and one-half years to correct this matter if it is something that needs to be corrected.

Justice STEPHENS. What do you say to Mr. Bromley's contention that the pleadings nowhere charge that any of these agreements were illegal on their face?

Mr. STEFFEN. Well, your Honor, I would say as to that, that they don't have to. The Court can read the contracts, and if we say —

Justice STEPHENS (interposing). Perhaps the Court's question wasn't quite correctly put. As I understand Mr. Bromley's contention it is this, that the theory of the Government in the case under all of its pleadings in the complaint, has not been that these agreements are illegal upon their face, but they are illegal because they were subterfuges and a cloak for alleged illegal price fixing.

Mr. STEFFEN. That is right, in general, but let me make it very clear that I do not accept Mr. Bromley's statement of the theory of the Government's case at any time.

Justice STEPHENS. Hasn't that been the theory, as the Court stated, of the Government's case?

1871 Mr. STEFFEN. I don't think so, I hope not.

Justice STEPHENS. I want to be clear about that, Mr. Steffen, because all three of the members of the Court have been clearly of the view from the beginning that the Government's charge here was that these license agreements, though on their face patent license agreements of an

orthodox type, were subterfuges and cloaks for an illegal price fixing and monopoly and conspiracy. Isn't that your charge?

Mr. STEFFEN. We definitely charge that, that is the bulk of this case, but note carefully in paragraph 46 it says, "said combination was entered into and has been, and is being, carried out by the defendant companies in part (in part) under the guise of numerous license agreements purporting to relate to the use of certain patents", and so on.

Now our complaint is very clear that we have a broad charge of price fixing. Paragraph 44 says in so many words that the defendants have entered into a contract in restraint of trade, and we set the contract out.

Secondly, if we didn't operate under Section 1, which says that any contract, combination or conspiracy in restraint of trade is illegal, we say—we have made a charge that these contracts are illegal. That appears in paragraph 44, we have set the contract out.

The contract provides on its face for resale price maintenance on the part of goods bought from second parties, and that would seem to make a clean-cut case on 1872 the pleadings at this moment.

But thirdly, and this is probably more important, we have made the general charge that the defendants are in a conspiracy to fix prices. Now that is in paragraph 45 (a). That is as to prices of gypsum board manufactured by these defendants, any and all of them. And what we are endeavoring to do with this evidence is to show that this contract, and what they did under this contract, was an effort on their part, and succeeded in large measure, to fix and help stabilize prices in the gypsum industry. They closed down three or four mills, the licensee bought board from the United States Gypsum Company and resold it at bulletin prices.

Now that, I say, can be used to substantiate our charge in paragraph 45 (a) that they did combine for the purpose of fixing arbitrary and non-competitive prices on gypsum board. So that our case is perfectly clear on that point.

Now I must go back to Mr. Bromley's reference to the word "such". He said that we had overlooked that word "such". Now we are making no contention as regards the November license agreements or the metallized lath license agreements, or the perforated lath agreements, that the contract related to anything but patented—I do not want to make any concession that they were patented or that the



goods were made under the patent—but the contract refers to patented goods, and when they said “such” goods 1873 they meant patented goods.

But that doesn't pass on the question of whether the licensees made them or whether somebody else made them. And therefore, dealing with patented goods, we say—that is, assuming that they are patented and that the contract refers to them—we say that the licensees bought from licensor or some other licensee and resold at fixed prices. So that the word “such” hasn't any bearing at all on the matter.

We have here, I think your Honor has a copy of this chart, the admissions of the defendants, the admissions to paragraph 76 of the complaint, in which we set up the allegation that they signed license agreements, and they have, each of them, admitted fully, as we see it, the genuineness of the agreements, and we now have them introduced in evidence and the Certain-teed contract is Government's Exhibit 10.

If you have Government's Exhibit 10, your Honor, which is the basic agreement between Certain-teed and United States Gypsum Company, and which is, I might say, controlling here, and will refer to page 5 of the agreement, the middle of the full paragraph, you will find the words, “or any of said plaster board or gypsum wallboard manufactured by second parties and which shall embody the inventions and improvements”, and so forth.

That indicates that it was a patented board, so-called, bought from other parties, but that the licensor reserved the right, expressly and definitely, to fix the price 1874 upon patented board bought by this licensee, Certain-teed, from second parties.

Mr. BROMLEY. That mistake was carried in almost all the licenses, and I think it was not caught until the Texas license, and then it was caught and corrected.

Justice STEPHENS. Were you in the criminal case, Mr. Knuff?

Mr. KNUFF. No, I was not, your Honor.

Mr. STEFFEN. Neither was I, your Honor.

Mr. BROMLEY. Another reason that I have never paid any attention to it is that if you read it as it is, it plainly has reference only to the licensee. The phrase “second parties” can't refer to anybody else. So it doesn't make any difference whether you correct the mistake or do not. All you have to do is read it to see that it clearly refers to price fixing on board manufactured by the licensee un-

der the patent. All you have to do is to read it and that is all it can possibly mean.

And furthermore, there is the complaint in which you find, in paragraph 114, under "metallized board agreements", a specific charge that we fixed the price on goods purchased from us by other licensees for resale, a specific charge under metallized board.

So you can hardly say that the Government made an inadvertence. They specifically charged it as to metallized board and they charged it as to nothing else. And

1875 if they had ever thought that this material that

Certain-tee'd bought from us down in Virginia and resold, that we fixed the price on that, they would have charged it in the complaint. But they did not, they never charged that we fixed the price on any board bought from us by a single licensee for resale, except in this paragraph 114 which is confined to metallized board.

So they knew what they were doing at the time they drafted the pleadings, and they have known it ever since, and this is either an afterthought, or what I believe it to be, a complete misapprehension on the part of Government counsel.

Justice STEPHENS. Let me just ask one other question. Aside from this question of the use of the words "second parties", Mr. Steffen, I am not quite sure I get your second contention as to why this type of evidence is relevant.

As I understand your argument, you make two contentions, the first being that by the use of the words "second parties", this evidence is relevant; but also that for another reason it is relevant. I am not quite sure I understood that second contention.

Mr. STEFFEN. The first argument is as your Honor stated, that these contracts expressly provide for control of the sale of patented board by licensees from whatever source obtained, that is from second parties. A second party could do nothing else as we construe it —

1876 Justice JACKSON (interposing). Why didn't they say "other parties" if they meant what you said?

Mr. STEFFEN. "Second parties" is an equally good form.

Justice JACKSON. In a contract between two people?

Mr. STEFFEN. Yes, it would be quite usual. A purchase from "second parties" or "other parties". It indicates that it is not the licensee, which is Mr. Bromley's contention.

First they have a provision saying that they can fix the prices on board manufactured by the licensee, and then they have a second clause in there saying that they can

fix the price on board manufactured by licensee—that is if you construe “second parties” as referring to licensee, which would be a duplication.

Justice STEPHENS. The term “third party” is frequently used by lawyers as referring to somebody extrinsic to the contract.

What is your second point?

Mr. STEFFEN. The second point is the broader point which says that irrespective of the illegality of the contract, that we make a charge in the complaint that the defendants have conspired to fix prices of gypsum board in interstate commerce.

Now that is stated broadly in paragraphs 44, and 45—45 (a). Now if there is a situation developing, as we can establish it was pretty widespread in the industry, of one licensee buying from another licensee, it becomes  
1877 very important to that charge to determine how they resold that board.

We say they have an agreement or a conspiracy to fix prices. Now if it were possible for a licensee to buy from another licensee, or from United States Gypsum, and then to sell at a lower price, you would have a demoralized market.

We are endeavoring to show that this board bought by one licensee from another licensee or from United States Gypsum was sold at bulletin prices. Now that is very relevant to show that the defendants were fixing prices, high and arbitrary prices. They had an agreement among themselves that they, as licensees, would sell the board they manufactured. They actually, whichever way your Honors construe the clause in the contract, they actually were buying board from other licensees and selling it at bulletin prices, and they bought a very considerable quantity.

Now if we show—and we are entitled to do it—if we show that they did buy board from other licensees, and resold it at bulletin prices, that goes to establish our very clear contention that they conspired to fix and maintain high and arbitrary prices throughout the district east of the Rocky Mountains.

Mr. BROMLEY. But there is no charge in the complaint that covers that at all. It never was thought of before.

No charge is made even by indirection that we fixed  
1878 the prices of board purchased from us. We never had the right to, we never tried to, we knew we hadn't that right and the Government has never charged before that we did.

Mr. STEFFEN. This is purely a matter of evidence, your Honor. We made a definite charge that they did fix and maintain prices on board throughout the eastern territory of the United States. Now here was one type of sale that could occur and we want to show that on this type of sale they maintained the high and fixed prices.

Justice STEPHENS. We will consider the matter during the recess.

(Thereupon; at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1879

## AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p. m.)

Justice STEPHENS. The Court would like to make one or two other inquiries before attempting to rule upon the issue presented by the offering of these exhibits which are now being marked.

I would like to make first one inquiry of you, Mr. Bromley.

Is there not somewhere within the pleadings here, an admission or assertion by the defendants that they did buy some materials or board from each other, and if so, where is it, and what does it relate to? It lies in my mind that somewhere in the answers or in the pleadings there are statements that some materials were purchased by one defendant from another. Now I may be mistaken, maybe it is by manufacturing distributors, but I would like to have my recollection refreshed on the subject.

Mr. BROMLEY. I think the only reference in the pleadings has to do with metalized board. There, admittedly, certain licensees for a time bought foil board from United States Gypsum because the licensees in question were not equipped to make it, so they bought it. And that, I think, is alleged in the complaint, indeed I know it is alleged in the complaint in the paragraph I referred to this morning, which is paragraph 113 and also paragraph 114. That is undoubtedly admitted in the answer.

1880 Mr. ADAMS. As far as our answer is concerned, your Honor—

Justice STEPHENS (interposing). Just let Mr. Bromley finish first, please.

Mr. BROMLEY. We don't admit the whole paragraph, but I think the answer admits that certain licensees did pur-



chase for resale metallized board, but it is limited to metallized board.

Justice STEPHENS. And how was that sold with respect to the alleged price fixing, as far as the pleadings show?

Mr. BROMLEY. As far as the pleadings show it is alleged in paragraph 114 in the sentence beginning in the second line, top of page 30:

"Throughout the period from the execution of said license agreements to the date of filing this complaint, USG has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and USG."

That is the Government's allegation. That we deny, of course. We did not fix that price, had no right to, and never assumed to. The licensees could sell it at any price they wanted. Of course, as a matter of business, they probably sold it at the same price as the others were getting for it. But we didn't fix it, and we had no right to.

1881 I think that is the only reference in the pleadings to the purchase by a licensee of board made by another.

Mr. ADAMS. I could direct you specifically to our answer to paragraph 114 but it is substantially what Mr. Bromley has stated.

Justice STEPHENS. With respect to the Government's contention, the Court is somewhat puzzled, Mr. Steffen, as to exactly what your contention is. It appears to us, in considering some aspects of it, that you are contending now that you are entitled to prove—this has special reference to your argument with regard to the word "second parties" in one of the agreements—it seems to us that in considering your statement made this morning, that you are in one aspect offering to prove that the defendants bought board from what are ordinarily referred to as third parties, that is persons other than the licensees, strangers to the transaction entirely, and then sold that board at bulletin prices.

Are you contending that?

Mr. STEFFEN. No. The language that we referred to is language appearing in a contract between a licensee and the licensor, just two parties, and we are contending that when they used the phrase "second parties" there, they

meant anyone else who manufactured this type of board.

Justice STEPHENS. You mean any other licensee?  
1882 Mr. STEFFEN. It would necessarily mean a

licensee because licensees were the only people who could manufacture this type of board.

Justice STEPHENS. Then your contention narrows itself to this, does it not, that the defendants did buy board from each other—that is to say, to be specific, to take an example, that Ebsary would buy some board from Certain-teed, for example, I am using these names as examples merely for purposes of illustration, and that Ebsary would buy that board from Certain-teed necessarily under the license agreements at the price fixed by USG?

Mr. STEFFEN. Well —

Justice STEPHENS (continuing). And then, as we understand it—let me state what the Court understood you to be contending—that it would buy that board from Certain-teed at, by definition, the prices fixed by USG because the licensee was bound to sell at those prices, and then Ebsary, after having bought it at such price, would also resell it at the same price under the bulletins. Is that your contention?

Mr. STEFFEN. I have made no contention as to the price that a licensee bought at. That will have to be developed in evidence. Ordinarily they would buy it at a lower price from USG or from another licensee, and then resell at bulletin prices, just as though they were reselling board which they had made themselves, and when you consider that they sell to dealers, it would be almost impossible  
1883 for them to maintain two prices on the board they make and the board they buy from other licensees.

Now we wish to introduce that to show that they carried out this agreement to buy from second parties and that USG reserved the right—whether they exercised it or not, they reserved the right—we contend in the contract to control that price at which the licensees sold to dealers, board which they bought from other licensees.

Justice STEPHENS. In other words, your contention is that the complaint fairly charges that, and that therefore you are entitled to prove that when one of the defendants bought board from another defendant, and then resold it to a dealer, the price of that resale was within the power of USG to control under these license agreements, and that it did control such price?

Mr. STEFFEN. We say that they reserved the right in their agreement to control the price, and we will show also

that the actual fixing or the actual price at which they sold, was part of this general agreement to maintain and fix high and arbitrary prices throughout the industry.

So that there are two lines of argument.

May I call your Honor's attention to the May agreement where the parties were a little more explicit. There is a series of agreements here, and this clause on "second parties" that we have been talking about has been 1884 gradually refined until 1937 when they just omitted it entirely, as we contend. They didn't say that they would not attempt to fix prices on board purchased from others, but they said nothing on the point.

Now if you will look at the May agreement —

Justice STEPHENS (interposing). Where is that?

Mr. STEFFEN. That appears in the complaint on page 47. That is the May, Ebsary agreement, which was modeled after the early Beaver agreement, and continued for all those years between 1926 and November 1929.

There the licensee expressly covenants. You will notice the last few lines of the middle paragraph on page 49, "and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated by the Licensor in said notice or in any such written or telegraphic notice of a change in such price or prices."

You see at that time the parties had an express covenant on the part of the licensee that they would not sell any plaster board. Now that "any" is not "any such" plaster board, but that is "any" plaster board.

1885 These are very careful attorneys; they knew what they were doing and they have drawn these provisions to express their intent. They have been examined by counsel for every licensee and the licensor, and it seems, beyond any question, that their intent and purpose was that as board, or any other so-called patented products, was bought from one licensee by another, that its resale was to be at bulletin prices.

When they moved into the November agreement, they would drop the licensee's covenant, but they put in a provision squarely that the licensor could fix the prices upon the board manufactured by the licensee, or upon any board

sold by a licensee, wherever obtained, obtained from second parties, and then when they go on into it later in their, shall we say conspiracy, when in 1937 they came to draft the Texas agreement, they dropped out any provision whereby the licensor could control the resale price of board purchased by a licensee and resold. They did not make any other change.

Of course, as the pleadings now stand, they have admitted these agreements, they have had three and a half years to amend if they had any doubt about them at all, and it seems to us that the contracts speak for themselves, as we have been told for a matter of weeks here.

Justice STEPHENS. The Court would like to ask you one or two other questions, which have to do with doubts that arise in the Court's mind.

1886 The question before it now is whether or not the class of evidence covered by these proposed exhibits, and covered by the statements that you have made, is admissible within the pleadings.

Now paragraph 45 of the complaint, section (a); says:

"(a) Concertedly raising and fixing at arbitrary and non-competitive levels the prices of gypsum board manufactured and sold (not "or sold") by said companies in the Eastern Area".

It would seem to the Court, in the usual usage of terms, that that is contemplated as covering board manufactured and also sold by a particular licensee.

Then in subparagraph (c) it states:

"(c) concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies", and so forth.

Now again, towards the end of the complaint, on page 22, where the charge of price fixing is especially made in paragraph 90:

"Throughout the period from the year 1929 to the date of filing this complaint, USG has determined and fixed the billing prices and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees."

1887 It doesn't say "sold by said licensees", but "manufactured" by them.

And then paragraph 91, with respect to the bulletins, seems to relate to prices, terms and conditions of sale of gypsum board; and construing that with the context of the



previous paragraphs, it would seem to relate to gypsum board manufactured and sold by the licensees.

With reference to the phrase in paragraph 46 of the complaint on page 10, "in part", where it reads:

"Said combination was entered into and has been, and is being, carried out by the defendant companies *in part* under the guise of numerous license agreements", and so forth, and which goes on and alleges that these are not bona fide license agreements but were entered into for the illegal purposes described, we had thought thus far, in reading the pleadings, that that phrase, "in part", was not intended to cover such an item as you now seek to prove, that is the purchase of products from each other, and the sale of those at licensor's prices, bulletin prices, but a charge that in addition to the licenses, there were separate understandings as a result of which it would appear that the licenses were not themselves bona fide.

I state those only because I wish counsel to have every opportunity to answer any doubts that have arisen in the Court's mind before it reaches a ruling.

1888 Mr. STEFFEN. I will endeavor to take up the Court's arguments, if I may call them arguments —

Justice STEPHENS (interposing). They are not arguments, the Court is earnestly trying to understand counsel on both sides, and it seems only fair to the Judges that when doubts arise in their own minds as to what counsel are contending, that counsel should have an opportunity to answer such doubts.

Mr. STEFFEN. Very well, I will endeavor to take up the points in the order in which they were raised.

With respect to the first point that paragraph 45 (a) might be construed, as your Honor suggests, as applying only to board both manufactured and sold, I think that would be a possible and probably a probable construction. It is not a necessary construction, however. It could be either, because of the fact that it says, "manufactured and sold by said companies in the Eastern area". It isn't specific as to whether these companies both made and sold, or whether one made and sold to another. What I am getting at is this, that a transaction where USG sold to Certain-  
teed, and Certain-  
teed resold, would still be within 45 (a), it would be board "manufactured and sold by said companies", that is the defendant companies, "in the Eastern area."

Now that is, I think, a fair construction. I think the

more obvious construction is that it would be simply that one licensee made and sold, but the other is equally within the literal terms of the provision.

1889 I think your Honor then moved to paragraphs 90 and 91.

Justice STEPHENS. I also referred to the same phrase in paragraph 45 (c), "manufactured and sold", but you have really discussed that.

Mr. STEFFEN. Yes.

Justice STEPHENS. That is right, thank you.

Mr. STEFFEN. Now as to paragraphs 90 and 91—that was next, was it not?

Justice STEPHENS. I believe it was.

Mr. STEFFEN. The first sentence there, "Throughout the period from the year 1929 to the date of filing this complaint, USG has determined and fixed the selling price and terms and conditions of sale of its licensees for all gypsum board manufactured by said licensees",—that of course is a straight allegation. It doesn't say that we do not charge that they may have fixed the prices of licensees as respects board purchased from another licensee or the licensor.

Of course this is a matter of evidence, it is a matter of working out the whole case, and all we ask is that we be entitled to prove what is within the fair intendment of the pleadings.

You cannot construe this as a contract, as your Honor well knows, and say that inasmuch as you didn't agree to this, therefore you are not liable.

1890 Now in paragraph 91:

"From time to time throughout said period, USG has circulated among its licensees numerous bulletins setting forth the aforesaid prices and terms and conditions of sale for gypsum board. The licensees, throughout said period, have adhered to said prices and terms and conditions of sale. The prices and terms and conditions of sale contained in said bulletins will sometimes be referred to hereinafter as the bulletin prices".

What did the Court have in mind as to that?

Justice STEPHENS. In reading those two paragraphs together, it occurred to us that in reading them in the context of the whole complaint, and particularly in connection with paragraphs 45 (a) and 45 (c) they apparently referred to the fixing of prices, and the issuing of bulletins with respect to prices, upon board manufactured by

the licensees under these patents, and sold by them as manufacturers.

Mr. STEFFEN. I would like to say on that point, that so far as I have examined them, the price bulletins which USG has issued provide that they shall fix prices as respects board manufactured by the licensees. There is no provision that I have noticed in those price bulletins where they purport to fix prices at which the licensee will sell board bought from another licensee.

But that, as we contend, was perfectly correct on the surface. We wish to establish the fact, however, 1891 that they did do what they had a right to do, as we construe both their May—clearly their May—and their November contracts, which would be to fix or set the price at which licensees could sell board purchased from other licensees.

Now as respects the language, "in part under the guise of numerous license agreements purporting to relate to the use of certain patents owned by the defendant USG in the manufacture of gypsum board"—if I understood your Honor's statement, I think it would be substantially correct. We are alleging a very broad charge in paragraphs 44 and 45, and we come to paragraph 46 and say that those broad charges have been, in large part, carried out under the guise of numerous license agreements. We think that this language, "in part" carries notice that we did not expect to be limited in any measure to the license agreements themselves, and that the evidence under the broad charges should be admissible, irrespective of whether we introduced anything on patent license agreements.

Then the last language I think I have called your attention to before, on the top of page 11, is to the effect that, "the formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof", and that does not expect at all to be all-inclusive, it is just "more fully set forth". That implies that we can bring in 1892 any evidence that would establish our broad charges.

We needn't, as I say, have had anything from 47 to 120, and the complaint would still be good.

Justice STEPHENS. One other question that I forgot to ask you.

Do you contend that there is anything in the pleadings, except the allegations concerning metallized board or lath, which asserts or raises an issue as to the licensees, or defendants, buying from each other?

Mr. STEFFEN. Yes, decidedly.

Justice STEPHENS. What is there in the pleadings, in addition to that concerning the metallized board, on that subject?

Mr. STEFFEN. As to the metallized board, it is express and explicit. Note carefully that that discussion under the metallized board heading is merely a more full description of the combination which is charged in paragraphs 44 and 45. Note carefully that at the top of page 11 we say that we "more fully" set forth the way this conspiracy has been carried out, and when we get over to metallized lath, we set it out expressly and say, "here is a clear case." Mr. Bromley admits that they have done that, as I understand it.

Mr. BROMLEY. I do no such thing.

Mr. STEFFEN. Now that carries the argument that, if we also establish, as we propose to do, that the licensees bought board from other licensees, not metallized board but board generally, and that they maintained the price of that board when a licensee sold it to a dealer, 1893 we have a case squarely within our broad charge of a conspiracy in restraint of trade for the purpose of concertedly raising and fixing prices. And I should think your Honor would almost be able to take judicial notice of the fact that unless these licensees sold such board at dealer prices, that their price situation would be demoralized and broken up. They had to sell it at the same price. And all we wish to do is to establish—I mean they had to as a business matter—all we wish to do is to establish that.

Justice STEPHENS. There is ~~just one other~~ point that occurred to us that I forgot to ask you about, and that is that in paragraph 45 (e) it states:

"(e) concertedly inducing and coercing manufacturing distributors to resell at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from such companies".

The thought that we had was that—and we had this question to deal with, you will remember also, when we were going into the question of the motion for summary judgment and comparing the causes of action in the criminal case and the instant case—it was brought out there in the Court's opinion that one of the incidental differences in charges which we thought did not vitally affect however the cause of action itself, as a whole, was that in the complaint there was a charge of concertedly inducing



1894 and coercing manufacturing distributors to resell.

In other words, there was a charge of resale price fixing and maintenance in the complaint, as distinguished from the indictment.

And we had thought, Mr. Steffen, that that was the only charge, either expressly or impliedly within the complaint, which had to do with resale price fixing, and that the gist of the Government's charge in this case was that the initial prices fixed for sale by licensees were illegal. And it occurs to the Court that the evidence which you now seek to offer is evidence with reference to a resale price.

Mr. STEFFEN. I think it clearly is and it could have been charged both ways. We could have charged that they have controlled their own resale prices or, as we have done here, we could have charged that they maintained throughout the market, fixed and arbitrary prices. Now we could have charged it either way. The reason, as I understand it—I had nothing to do with making this pleading, but I think I can explain it—the reason for paragraph 45 (e) appearing as a separate paragraph is that it names different people. They could have put in there also that they controlled their own resale prices and the distributors'. That would have been appropriate. It wasn't necessary because of paragraph 45 (a) which says that they, among themselves, the licensees, were controlling their prices.

When they got to (e) they made the charge that they controlled third parties, and that is distributors' prices, not their own but distributors' prices, and therefore it was a perfectly appropriate separate charge.

I would like to say in that connection—this point having been brought up—that I read the indictment again this noon, that is Criminal Case 66,008, which Mr. Bromley tried, and it is very express upon the point that the only matter in issue was the resale prices of distributors, and that there was no charge whatever in the indictment having to do with resale price maintenance on the part of the licensor and a licensee; that this issue which we have presented here was clearly not within the indictment.

Justice STEPHENS. I thought there was no charge in the indictment of resale price fixing?

Mr. STEFFEN. That is all that was in the indictment, resale price maintenance.

Justice STEPHENS. Maybe my memory is serving me very badly.

Justice GARRETT. I think paragraph (e) was the prin-

cial element in that criminal case. My memory may be at fault.

Mr. STEFFEN. I will refer your Honor to the indictment, page 8, paragraph 14.

Justice STEPHENS. Let me get the opinion on the motion for summary judgment.

Mr. STEFFEN. I can read the language that I have in mind, if you wish.

1896 Justice STEPHENS. Let me refresh my own recollection, Mr. Steffen, also.

Yes, the Court either misremembered or misspoke. The complaint charges not only the fixing of resale prices of manufacturing distributors, and the elimination of jobbers, as does the indictment, but also three additional consequences. So that it was charged in the indictment, you are correct about that.

Is there anything else, Mr. Steffen?

Mr. STEFFEN. I think not, your Honor, other than to say that this is a very important part of the Government's case.

Justice STEPHENS. We understand that, and for that reason we are anxious to be careful about our ruling.

Mr. Bromley?

Mr. BROMLEY. May it please the Court, the answer to the next to the last question which your Honor asked Mr. Steffen is that there is nothing in the complaint about resale prices charged by licensees who buy board from others. There is just nothing in the complaint about that, and I think the fact that he has made no attempt to refer to any part of the complaint, shows that.

Now that is the correct and short, simple answer to that question. The complaint does not mention that. It mentions only two types of resale control, these manufacturing distributors as one, and the purchase by some of the licensees of metallized board from the manufacturer  
1897 is the other—and that is all.

Now in that connection I did not admit this morning—and I do not admit now, as Mr. Steffen indicated—that we did fix the resale prices of metallized board. We did not.

Now Mr. Steffen, it seems to me, passes over very lightly a new factor which he has evidently discovered over the noon hour, and that is this. As your Honor indicated, paragraph 90 and paragraph 91 of the complaint, page 22, allege that USG fixed prices over the period, and your Honor called his attention to paragraph 91, at the bottom

of page 22, and pointed out to him that there was an allegation that USG had circulated bulletins setting forth the prices.

Now that paragraph ends up on the top of page 23 with a reference to Exhibit No. 7 as having been annexed to the complaint, so there can be no doubt about what they mean, and Exhibit No. 7, which is the bulletin fixing the prices, is printed on page 85, and as my friend said, nothing could be clearer than the provisions contained therein, in the first sentence which says:

"Dear sir: Referring to our license contract with you, you are hereby notified that effective February 7, 1939, the minimum prices at which you may sell gypsum wall-board and gypsum plaster board manufactured by you and embodying inventions and improvements set forth and claimed in our patents under which you are 1899 licensed (not including applications for letters patent) are as follows:"

Now that phrase appears in that form, and no other form in every license bulletin sent out by the licensor, all of which I believe are now in evidence, and you can look at any one of them, issued at any time, from beginning to end, and you will find nothing other than this explicit provision that the minimum prices at which you, Mr. Licensee, may sell board, are to apply to the board manufactured by you, not manufactured by second parties or somebody else, and not bought by you, but only manufactured by you.

1899 So that if we needed anything more, it seems to me, than a construction of the contract itself, it is to be found in the undisputed evidence as to what it was that the Licensor fixed, and it only fixed the price of board manufactured by the licensees under the patent.

And finally, it seems to me that Mr. Steffen is guilty of a great unfairness when he picks out but a portion of a single sentence in the May, 1929 license, as he did on page 49 of the complaint. He picks out the concluding words of that paragraph, and that paragraph is one sentence. But if he had called Your Honor's attention to the opening of the sentence you would see how unfair his reference is. The paragraph begins:

"It is expressly understood and agreed that the indivisible and nonexclusive right, license and privilege aforesaid is granted upon condition that the Licensor shall have, and it hereby reserves the right to determine and fix at any time and to change from time to time during the term of

said Utzman Patent Number 1,034,746, the minimum price or prices at which the Licensee shall sell any plasterboard or gypsum wallboard manufactured by Licensee embodying the improvements" and so forth. That is the only right that was reserved in the contract, and all the rest of it just carries out what shall be done. The next clause is, "and in case it shall exercise the right so reserved it shall first serve written notice of its intention so to do 1900 upon Licensee, accompanied with a statement of the price or prices at which the Licensee shall sell said patented product" and so forth. Now "said patented product" is a product manufactured by it under the patents. Continuing, "and thereafter shall give to the Licensee written or telegraphic notice of any change in such price or prices, and the Licensee expressly covenants and agrees that it will not at any time during the term of said Utzman Patent Number 1,034,746, after the receipt of such notice, directly or indirectly sell or offer for sale any plasterboard or gypsum wallboard embodying the improvements set forth and claimed in said Utzman Patent Number 1,034,746 prior to the expiration thereof at a price or prices less than that stated" and so forth.

Now that clearly all refers to the price which the Licensor fixes for the Licensee to charge when it sells the board which it has made, and I contend that that provision is equally clear in every license from then on, and prior thereto, during the whole period, and there wouldn't be any doubt about it except for this unfortunate use of the phrase "second parties" in the Ebsary contract, to which attention has been called, and in others. And I say again, even as to that, that even if you leave the "second parties" in there the reference is clearly to the licensee.

You will notice sometimes that that clause says "licensee" and sometimes "second parties." But the clear intent of it, as it stands, is "Licensee". All you have to do is 1901 read it, it seems to me, to come to that fair interpretation. And when you find that under that very contract the bulletins that were issued are all specifically limited to the board manufactured by the Licensee, it seems to me that all possible doubt is ended.

Mr. STEFFEN. Your Honor, I have inadvertently not called your attention to a provision which is right in point, I think. We frankly didn't expect to have a discussion of this length on this point, but at Paragraph 85(c) of the complaint, on page 20—Paragraph 85, you will note, de-



scribes the agreements between U.S.G. and the various companies, and sets out a copy of Exhibit No. 6 in the Appendix. Mr. Bromley has referred to the exhibit concerning the price bulletins, and this is equally a part of the complaint, the October and November license agreements.

Paragraph 85(c) says broadly just what we have been contending here, that in that agreement, "U.S.G. reserved the right to determine and fix the prices at which the licensees sold board embodying the improvements claimed in the Hite and Haggerty patents, or in any patents subsequently issued on the applications relating to the foam process."

Now our construction of those agreements is that they reserve the right to fix the price on any board so long as it embodies those inventions.

1902 Now the question is embodying those inventions whether made by the licensee or any other licensee. And our contention is that the language is very explicit and clear that in the May agreement, and equally I think in the November agreement—in the May agreement the language is very explicit that U.S.G. reserved the right to control the price at which the licensee should manufacture any board and sell any board under these patents; and following upon that, the licensee covenanted that he would not sell any board at any other price than that fixed by the licensor.

Now I was surprised that I should be spoken of as being unfair. You are familiar with that whole sentence, and I think the more often you read it the more clearly it will be established that it relates to the patented board, but it expressly states that whether the licensee manufactures it or whether he gets it otherwise, that they will fix the bulletin price.

I think Paragraph 85(c) answers the question entirely, and I am very sorry to have taken the Court's time.

Justice STEPHENS. What do you say as to 85(c), Mr. Bromley?

Mr. BROMLEY. That is the sum and substance of Exhibit No. 6, that is all that is. Exhibit No. 6, in Paragraph 2, has a provision which I say is plainly limited to board manufactured by the licensee.

1903 Justice STEPHENS. Exhibit 6 is which one?

Mr. BROMLEY. The Ebsary agreement, starting on page 66, and the paragraph referred to is on page 69. That is the one we started out discussing this morning.

Justice STEPHENS. That is the one that contains the phrase "second parties"?

Mr. BROMLEY. Yes, Your Honor.

So I say that 85(c) is hardly any allegation that we are charged with fixing the resale prices of board purchased by licensees for resale. All that is a summary of the Ebsary agreement.

Justice STEPHENS. The Court will be in recess for a few moments.

(Whereupon a short recess was taken, after which the hearing was resumed.)

1904 Justice STEPHENS. The record will show the Court in session.

The Court has considered the contentions of counsel on the matter now before the Court, which is a question, whether, within the pleadings, there is admissible evidence offered to prove the fixing of resale prices upon board, gypsum board, purchased by one of the defendant licensees from another.

The Court is of the view that within the fair intendment of the pleadings, such evidence is not admissible. The Government, in order to protect its record, is given an opportunity, if it wishes to do so, to make a formal offer of proof in writing, at your convenience, in order that a record may be made on the subject which would adequately protect you in the event of an adverse decision and appeal.

You may proceed, therefore, on another line of testimony.

Mr. STEFFEN. Would Your Honors' ruling also be made explicit that we are not entitled to introduce evidence of resale price for purposes of showing that the defendants have concertedly fixed and maintained uniform prices within paragraph 45(a)?

Justice STEPHENS. Yes, we think the ruling goes that far. You may make an offer broad enough to protect your record in that respect.

We are not intending to rule that you can not show that the purpose of these agreements, of course, was subterfuge and cloak. We are not intending to rule that  
1905 you are forbidden to show that the consequences of the agreement and the intention of the agreement was to fix prices on gypsum board manufactured and sold under these licenses. But we do rule that the issue with respect to resale prices of board purchased by one licensee from another is out of the case, under the pleadings as drawn.

Mr. STEFFEN. May I have that latter part read, Your Honor? It seems to me that Your Honor's statement would indicate that this evidence would be admissible for purposes of showing that the defendants were fixing prices, not for purposes of showing that it was an illegal control of resale prices. Am I correct in that?

Justice STEPHENS. You may have the Court's statement read.

(The record was read by the reporter.)

Justice STEPHENS. The Court would have spoken more correctly if it had said, "is not in the case".

You may, at your leisure, consider the Court's ruling and prepare an offer of proof, Mr. Steffen, and if you are disconcerted by the Court's ruling in respect of your preparation, the Court will accord you a reasonable opportunity to take up another line of testimony by a recess, if necessary.

Mr. STEFFEN. I would like to have a 4 or 5 minute recess, if you please.

1906 Justice STEPHENS. The Court will be in recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, gentlemen.

By Mr. STEFFEN.

Q. I would now like to ask you some questions concerning metallized plaster board, Mr. Brown. But first, I will show you Government's Exhibit No. 242, which purports to be a letter from the General Manager of the Gypsum Division of Certain-teed Products, addressed to Mr. Henning of the United States Gypsum Company, under date of August 10, 1934, a carbon copy of the letter, rather.

Justice STEPHENS. Where is that, Mr. Knuff, in this file?

Mr. KNUFF. We have skipped quite a considerable number of exhibits, Your Honor. I think that would appear after the contract dated the 15th day of January, 1936.

Justice STEPHENS. What is the date of the letter?

Mr. STEFFEN. August 10, 1934.

Justice STEPHENS. I have it. It is a letter from Certain-teed to Mr. Henning?

Mr. KNUFF. That is correct.

Justice STEPHENS. Thank you. That will be Exhibit No. what?

Mr. STEFFEN. Exhibit No. 242.

1907 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you examined Exhibit No: 242, Mr. Brown?

A. Yes, sir.

Q. Do you know whose initials those are at the top?

A. I would assume that they are Mr. Van Hagan's.

Q. Could you identify them?

A. They are his initials.

Q. Did you ever see this letter, Mr. Brown?

A. I don't remember, sir.

Q. Are you familiar with the subject matter of the letter?

A. I recall we attempted to buy some board, that is all, at one time.

Q. Do you recall whether you made an application for a license?

A. I don't recall as to that, no, sir.

Q. What do you recall with regard to the buying of board?

A. I think we bought some, but I am not sure of that.

Q. Do you recall who you bought from?

A. No, sir.

Q. Do you recall whether you approached the U. S. Gypsum Company for board?

A. I don't recall, but I think we did.

1908 Q. Do you recall whether they sold you any?

A. I testified that I don't remember for sure.

Q. I see.

I would like to show you Government's Exhibit No. 243 for Identification, which purports to be a memorandum of yours under date of August 28, 1934, to Mr. Van Hagan.

Justice STEPHENS. What company was Baker with, Mr. Steffen?

Mr. STEFFEN. National—president.

By Mr. STEFFEN.

Q. Have you examined Exhibit 243, Mr. Brown?

A. Yes, sir.

Q. Is it written on your usual interoffice stationery?

A. Yes, sir.

Q. And is Mr. Van Hagan living?

A. Pardon?

Q. Is Mr. Van Hagan living?

A. No, sir. My understanding is that he isn't.

Q. Can you identify that as your memorandum?

A. I don't remember it, but I assume it is my memorandum.



Mr. ADAMS. I respectfully move to strike out his assumption.

By Mr. STEFFEN.

Q. Will you please state whether or not it accords  
1909 with your recollection?

Justice STEPHENS. It may go out.

The WITNESS. I don't remember the memorandum.

Justice STEPHENS. Do you remember writing him on that subject?

The WITNESS. No, sir, Your Honor, I don't.

By Mr. STEFFEN.

Q. Do you know who the initials "AGS", over to the right of your name, refer to?

A. That would be the secretary. I couldn't recall her name at this time. I don't recognize the initials.

Q. Now as you read the memorandum, does it refresh you concerning any transactions you may have had with the National Gypsum Company looking to the purchase of metallized board which you testified to?

A. No, sir, it does not.

Q. Could you tell the Court who you attempted to buy metallized board from?

A. I don't recall that I even handled the negotiations. I don't know who handled them.

Q. You recall simply that the company attempted it at one time or another?

A. That is my memory, yes.

Q. Could you give us any assistance at all as to who might have handled the purchase of metallized board for your company, at this time?

1910 A. No, sir. It could have been one of several people.

Q. Name them, please?

A. Mr. Van Hagan and Mr. Henley would have been two likely people.

Q. I now show you Government's Exhibit No. 244 for Identification and Government's Exhibit No. 245 for Identification and Government's Exhibit No. 246 for Identification —

Justice STEPHENS (interposing). Do they follow serially?

Mr. STEFFEN. Yes.

Justice STEPHENS. Exhibit 244, then, is the letter from Mr. Henning to C. O. Brown, dated September 24, 1934?

Mr. STEFFEN: That is right.

I would like to state that 245 and 246 were enclosures in the letter which has been identified as Exhibit No. 244. The three items were together.

Mr. ADAMS. Well, I think that is an assumption.

Justice STEPHENS. That is what you contend they are, at any rate, is it, Mr. Steffen?

Mr. STEFFEN. At least we do that. They refer to each other.

Justice STEPHENS. You may proceed.

By Mr. STEFFEN.

Q. Have you examined the three exhibits, Mr. Brown?

A. Yes, sir.

1911 Q. Are you able to identify the handwriting on the left-hand side of Exhibit 244?

A. Yes, sir, it is a memorandum to A. Whittemore signed by myself.

Q. It was your opinion that you should take out a license?

A. Yes, sir.

Q. Are you familiar with Mr. Henning's signature?

A. Yes, sir.

Q. And do you recall having received Exhibit 244?

A. I don't recall it, but it is Mr. Henning's signature.

Q. Did you examine the two copies, the letter of Mr. Henning to Mr. Van Hagan and Mr. Van Hagan's letter to Mr. Henning, at the time you wrote your memorandum on the upper left-hand side?

Mr. ADAMS. I respectfully object to that. The witness has not testified that he ever saw Exhibits 245 or 246 before.

Mr. STEFFEN. He hasn't testified one way or the other. I am asking him —

Justice STEPHENS (interposing). Let's hear the question. I had my attention on the letters and didn't hear your question. What is the question that is now objected to?

(The question was read by the reporter.)

1912 Justice STEPHENS. That does technically assume that he saw them at the time. I thought you were asking him if he had examined them now.

Objection sustained. Rephrase your question.

By Mr. STEFFEN.

Q. Do you recall whether you examined the copies be-

fore you now, at the time you wrote your memorandum?

A. I don't remember —

Mr. ADAMS (interposing). I respectfully object. I make the same objection, Your Honor. The question is, I think, whether or not these are the letters, or copies of the letters, that were attached to Mr. Henning's letter of September 24. I think we are entitled to know that.

Justice STEPHENS. The Court thought that is what Mr. Steffen was really intending to ask the witness.

Mr. ADAMS. If it is, I withdraw my objection.

Justice STEPHENS. Do you remember seeing these two letters, marked 245 and 246, at the time you wrote the memorandum which you refer to?

The WITNESS. I do not remember.

By Mr. STEFFEN,

Q. I call your attention, Mr. Brown, to the fact that the letter speaks of an attached copy, that is, the letter you have identified as being Mr. Henning's letter. Do you recall that you did not see an attached copy at the time you wrote your —

1913 Mr. ADAMS (interposing). I object to that question. That he did not see it is immaterial. The question is—did he see these letters or didn't he?

Mr. STEFFEN. I am wishing to test his recollection on the point, Your Honor.

Justice STEPHENS. Well, the last question is not correct. Objection sustained.

You may ask him if he has any recollection on the subject. But when he has once testified that he doesn't recollect seeing them, then to ask him if he recollects not seeing them seems to me to be pressing the bubble of logic to the bursting point.

By Mr. STEFFEN.

Q. Have you any recollection on the subject of these two copies, Mr. Brown?

A. No, sir.

Mr. STEFFEN. We offer Government's Exhibits Nos. 244, 245 and 246 in evidence. We offer Exhibit 244 as clearly identified by Mr. Brown, both by Mr. Henning's signature and his own note appearing on the side. The letter itself, in the opening paragraph, refers to attached copy of "my letter to Mr. Van Hagan", that is, Henning's letter to Mr. Van Hagan, and it would seem that that in itself would identify Mr. Henning's letter, that is, the copy of

1914 Mr. Henning's letter, coupled with the fact that both the letter of September 24 and the two copies, Exhibits Nos. 245 and 246, were received from the Certain-teed Products Corporation under subpoena, and, of course, that matter is established by the Item No. appearing up at the top on the right-hand side of each of the three letters.

Justice STEPHENS. Do you wish to be heard, Mr. Adams?

Mr. ADAMS. Might I ask a question, Your Honor?

Justice STEPHENS. Yes.

Mr. ADAMS. Mr. Brown, it is a fact, isn't it, that Mr. Henning and Mr. Van Hagan had occasion to correspond quite frequently, didn't they?

The WITNESS. They had correspondence.

Mr. ADAMS. I object to the introduction of Exhibits 245 and 246 on the ground that no proper foundation has been laid. I do not object to Exhibit 244.

Justice STEPHENS. Do you concede that the Item No. at the top of the letters indicates that they are from your files, that is, from the files of Certain-teed, Mr. Adams?

Mr. ADAMS. Oh, yes.

Justice STEPHENS. The Court notes that the numbers are not serial.

Mr. ADAMS. There is no question that those were put on there by someone in the Certain-teed employ, Your Honor, but we do not agree in any sense that these are seriatim; and even if they happened to be seriatim, I know  
1915 enough about this filing system, which was devised by someone with a devious mind, to say the least, in the early days of this case, to know that there is no such thing as a serial system in the filing system which was set up, and I can assure Your Honor that that has no evidentiary value whatever.

Justice STEPHENS. We think the exhibits are admissible. The objection is overruled.

Mr. ADAMS. May I have the usual objection to the admission of all of them?

Justice STEPHENS. Yes, they are received subject to the usual reservation with respect to the declarations of alleged co-conspirators.

Exhibits 244, 245 and 246 are admitted in evidence.

(The documents referred to, marked as Government's Exhibits Nos. 244, 245 and 246, were received in evidence.)

Mr. STEFFEN. I now offer Government's Exhibit No. 242, which I think is identified by Mr. Van Hagan's initials



at the top, and the fact that it comes from the files of Certain-teed Products Company and is in all other respects apparently regular, and is a letter upon the subject that we are now taking up.

Justice STEPHENS. Is there any objection to 242?  
1916 Mr. ADAMS. Yes, I object to 242, Your Honor, on

the ground that no proper foundation has been laid. I would point out to the Court that this is, if anything, a copy of a letter. It doesn't purport to be the original. Nothing is shown here to indicate—the witness has testified, rather, that he has no recollection about the letter whatever. Mr. Van Hagan is dead, and Mr. Henning is dead.

Justice STEPHENS. I have forgotten what the witness said about Exhibit 242.

Mr. ADAMS. The witness said he could not identify it in any manner.

Mr. STEFFEN. He said he thought the initials up there were those of Mr. Van Hagan.

Justice STEPHENS. Maybe I am mistaken in my recollection. Which initials were you referring to?

Mr. STEFFEN. The pencilled initials at the top.

Mr. OLIVER. May I interject this: The witness said they were the initials of a certain individual, but he didn't say that that individual wrote them.

Justice STEPHENS. That is cutting very fine, Mr. Oliver, unless it is a forgery, or asserted to be such.

What do you say—refresh the Court's recollection, Mr. Brown. Look at 242 again. What do you say with respect to the pencilled initials up at the top, just over the word "Vice-President"? What do you say with respect to those?

The WITNESS. I don't recall, Your Honor, testi-  
1917 fying on those.

Justice STEPHENS. It is my recollection, Mr. Steffen, that the initials which he identified were the initials of a secretary.

The WITNESS. No, "HHV", I identified.

By Mr. STEFFEN.

Q. At the bottom?

A. Yes.

Q. What I asked you, I thought, was what those initials were at the top.

A. I can't identify those. They don't look like anything to me.

Q. They look like "COB", don't they?

A. The "C" might be, but I would never figure out the other.

Justice STEPHENS. We think that 242 is not sufficiently identified. True, it is on the subject of metallized plaster-board, but that is a little too remote a circumstance.

The other two exhibits, 245 and 246, were admitted in connection with 244 because the circumstantial identification of the three is much stronger.

Mr. STEFFEN. I offer Exhibit 243, which has been identified only as being a memorandum taken from the files of the Certain-teed Company, which is in the usual form, and the initials "AGS" are the initials of the sten-1918 ographer, as I understand it.

Justice STEPHENS. He said they were the initials of a secretary, but he couldn't remember the secretary. He meant they were a stenographic designation.

Has there been a ruling on this exhibit, Mrs. Gillette?

Mrs. GILLETTE. No, there hasn't been any ruling on that.

Mr. ADAMS. I object to it, Your Honor, on the ground that there is no foundation.

Justice STEPHENS. We think there has been no foundation at all laid for that exhibit. Objection sustained. The exhibit is not received.

By Mr. STEFFEN.

Q. I now show you, Mr. Brown, Government's Exhibits Nos. 247 and 248, which purport to be your instructions to various people concerning the metallized board sales prices, one under date of December 3, 1934, and the other doesn't appear to be dated.

Justice STEPHENS. Is the first one marked Item No. JJ-110?

Mr. STEFFEN. Yes, and the second one is JJ-109.

Justice STEPHENS. We have two marked JJ-110 in our file.

Mr. STEFFEN. That is right, they are attached, I think. And then JJ-109 is the other.

1919 Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you examined both Exhibits 247 and 248, Mr. Brown?

A. Yes, sir.

Q. Taking up 247 first, can you state whether that was

a bulletin which you sent out to District Managers, Sales Managers, and Salesmen?

A. I don't remember the specific bulletin, but it is signed C. Brown, Vice President, indicating I did.

Justice STEPHENS. Signed?

The WITNESS. Typewritten, Your Honor, the signature, which is customary with the company.

By Mr. STEFFEN.

Q. Was it customary for the company to sign in ink its letters or memoranda between officers?

A. No, sir.

Q. Now referring to the December 3rd exhibit, do you recall having sent that out?

A. If you will pardon me, I think you asked me regarding 247, which is the one I just testified on.

Q. Well, is that also dated December 3, Mr. Brown?

A. 247 is December 3; 248 isn't dated.

Q. Then we have the thing reversed.

1920 A. That is according to my copies.

Justice STEPHENS. I don't have any date on the one marked 247, on the first page.

The WITNESS. Mine is 248, Your Honor, that is what is causing the confusion, on the one that isn't dated.

Justice STEPHENS. 248 is marked December 3. 247 has two pages.

Mr. STEFFEN. These are exactly reversed, Your Honor. (Whereupon, the two exhibits under discussion were handed to Mrs. Gillette, who reversed the exhibit numbers and returned them to the witness.)

By Mr. STEFFEN.

Q. Now I would like to have you examine the exhibit marked presently 247, which is an undated memorandum, —

Justice STEPHENS (interposing). Of two pages, is that right?

Mr. STEFFEN. Yes.

The WITNESS. I don't recall the memorandum, but it is signed C. O. Brown, Vice President, which was the method of sending out bulletins.

By Mr. STEFFEN.

Q. Do you recall the subject matter of the announcement?

A. Well, it is a memorandum to our sales organization outlining the possibility of selling metal lath, and asking

1921 some of our men to secure certain information from the U. S. Gypsum Company.

Q. Do you recall that, presently?

A. No, sir.

Q. As being a memorandum that you sent out?

A. I don't recall it. I testified that I think I sent it out.

Q. You testified that you think you sent it out?

A. Yes.

Q. Now look at what has been marked Exhibit 248, the memorandum or announcement dated December 3, 1934, that purports to supplement the previous bulletin. Are those names up at the top, Van Hagan, Warren Henley, Phelps, and Laney, representatives of Certain-teed at that time?

A. Yes, sir.

Q. And was it customary to send out bulletins to your District Managers, Sales Managers, and Salesmen, from time to time?

A. Yes, sir.

Q. And is this on the usual form?

A. Yes, sir.

Q. Now do you recall having sent out a memorandum on this subject matter?

A. No, sir, I don't recall it.

1922 Mr. STEFFEN. I offer at this time, Your Honor, Government's Exhibits Nos. 247 and 248. They have been identified this far, that they are in the regular order; that it was customary to send out bulletins from time to time giving price information to District Managers, Sales Managers, and Salesmen; they carry the name of Mr. C. O. Brown, Vice President—would you normally be the person, Mr. Brown, to send out bulletins of this character?

The WITNESS. At this time, yes, sir.

Mr. STEFFEN. And they carry the Item Nos. JJ-110 and JJ-109, indicating that they came from the files of the Certain-teed Products Corporation.

I think that is circumstantial identification.

Mr. ADAMS. Might I look at the exhibits themselves, Your Honor?

Justice STEPHENS. Yes.

Any objection, Mr. Adams?

Mr. ADAMS. May I ask a question, please, Your Honor?

Justice STEPHENS. The two exhibits are offered?

Mr. STEFFEN. Yes.



Mr. ADAMS. I wanted to ask the witness a question.

Justice STEPHENS. I am sorry. Proceed.

Mr. ADAMS. Mr. Brown, with respect to both of these exhibits, you don't have any recollection about them at all, do you, now?

The WITNESS. I think I so testified, Mr. Adams, that I have no recollection of these bulletins.

1923 Mr. ADAMS. And you can't tell us now that they are anything that you prepared yourself, can you?

The WITNESS. Well, my testimony was as explicit as I could make it.

Mr. ADAMS. And that was, as I understand it, that it is merely because your name appears on these exhibits that you believe that that would indicate you might have prepared them, is that it?

The WITNESS. That is the basis of my opinion.

Mr. ADAMS. It is merely an opinion, isn't it, sir?

The WITNESS. Well, I couldn't swear I sent them out.

Mr. ADAMS. You have absolutely no knowledge as to whether they were sent out, in fact, have you?

The WITNESS. No positive knowledge.

Mr. ADAMS. And you have no recollection of actually having sent them out?

The WITNESS. No, sir.

Mr. ADAMS. Of course, you had assistants in the department, didn't you, in your department, I mean?

The WITNESS. Yes, sir.

Mr. ADAMS. I object, Your Honor, on the ground that no foundation has been laid with respect to either of these documents; and I should like to observe in that connection that it seems to me that, to use Your Honor's phrase, we are getting pretty close to the line on the admis-

1924 sion of this type of document. The witness has no recollection about these at all, he is just saying that his name appears on them. He says, "I can't say that I prepared it; I can't say that I sent it out; I don't know whether I sent it out; and I haven't any recollection about what is in the document."

Justice STEPHENS. Let me ask the witness one or two questions.

Mr. Brown, you did testify with respect to 247 that you think you sent that memorandum out. Did you base that statement, or did you not, upon the nature of the contents and your recollection of your duties in respect of the subject matter of the exhibit?

The WITNESS. I based it on the nature of the contents,

and my position at that time was one where I would normally send out such information.

Justice STEPHENS. I will call your attention to the fact that 248 refers to "Supplementing my recent bulletin above subject.", and that the subject of the two bulletins is Metallized Board. What do you say with respect to 248? Do you or do you not think that you sent that out? I am not trying to get you to testify one way or the other. I just want to be sure whether you do have some recollection, or not.

The WITNESS. I have no recollection of it, Your Honor, and my statement is the same about this as the other, that it was information that I would normally develop 1925 that was being requested.

Justice STEPHENS. Well, do you think that you sent the second one out, 248, if you sent the first one out?

The WITNESS. I don't know, Your Honor.

Justice STEPHENS. Well, the Court, with some doubt, rules that they are circumstantially identified. We hesitate a little. We don't want to establish a precedent of letting in exhibits without some identification, but there probably is sufficient circumstantial identification here.

Can't you identify them by someone else better, Mr. Steffen?

Mr. STEFFEN. Most of these people have died, Your Honor.

Mr. ADAMS. That, exactly, is one of my difficulties, Your Honor. We are being faced in this case with exhibit after exhibit which are addressed to people who are now dead. We have no way of verifying them ourselves. I am not arguing Your Honor's ruling. I should like to record the usual objection.

Justice STEPHENS. You may do so.

Of course, it seems to the Court—we realize you are quite within your rights in making these objections, and all counsel must feel free at all times to make whatever objections they feel necessary in the protection of their clients' interests on either side of the case—but there

1926 is no dispute that they came from your files, and they do concern the subject, all of them, of metallized board; they bear the name of the person who would normally correspond on that subject, and the names of the persons to whom he would normally write. The likelihood of their being manufactured would seem to me to be very remote.

1927 Mr. ADAMS. I quite agree on that, Your Honor,

and still it seems to me that my objection would be sound for this reason, that in any organization, particularly ours, there are many matters which are produced which are changed, revised, and never used, and may never have gone farther than the desk of the man who produced them, and they can have no evidentiary value whatever.

The difficulty with us—and I indicated this to Your Honors when we were arguing the question of the interrogatories—is that in my own case, the case of my own company, the entire management of this company has changed since 1936, and we are not in the position of many of the other companies who can immediately confer with present employees and verify facts.

So that I don't know what lies behind many of these exhibits and that explains, perhaps, my unusual attention to these matters of identification and foundation.

Justice STEPHENS. The Court is in no sense criticizing you, Mr. Adams. You are entitled to make your objections.

Mr. ADAMS: I understand that, Your Honor.

Justice STEPHENS. However, they are overruled with respect to these two exhibits, and they are received in evidence.

(The documents referred to, marked Govt. Exhibits Nos. 247 and 248, were received in evidence.)

1928. Mr. STEFFEN. I now offer Government's Exhibits 249, 250, 251, 252 and 253 in evidence. Your Honors do not have these nor are there photostats made of them. They have been furnished to us as United States Gypsum Price Bulletins on metallized board. They come in in the same way that the original price bulletins did, and are necessary to establish what the prices were for the metallized board during the period since the licenses were signed.

We do not expect to have photostats made, if we can avoid it, but we can at least photostat copies for Your Honors, and of course this set goes in as the originals. They cover a series of years.

Justice STEPHENS. Submit them to counsel.

(The proposed exhibits were submitted to counsel for examination.)

Justice STEPHENS. The reporter kindly calls the attention of the Court to the fact that the last two exhibits admitted were not admitted with the usual reservation. The reservation is made and they are admitted subject to the

usual reservation as to declarations of alleged co-conspirators.

Mr. ADAMS. We are obliged to the reporter and to the Court also.

Justice STEPHENS. If these exhibits will require the attention of counsel for the defendants for some little time, we might as well take the afternoon adjournment at this time.

1929 Mr. BROMLEY. They won't, Your Honor.

Justice STEPHENS. We are not trying to hurry you; take such time as you need.

Mr. BROMLEY. I think we can act promptly on them. We have no objection to them; we would like to reserve the right to check them at some future time for accuracy, and I think in fairness to Government counsel I should state that our failure to object is not a concession that these bulletins were sent to any particular defendant or to any of the defendants, as to which there is no proof.

Mr. ADAMS. I would like to say, on behalf of Certain-  
teed, that we do not admit that we received any of these bulletins. I will accept the statement of the Government that these are bulletins, but I will not admit that they were sent out, or that we received them.

Justice STEPHENS. They may be received in evidence. The statements of counsel made in their own protection may be shown of record.

Mr. OLIVER. I make the same objection on behalf of The Celotex Corporation.

Mr. JOHNSTON. I presume that goes for all parties.

Mr. VARIAN. And the same objection on behalf of Eb-  
sary.

Justice STEPHENS. You make the same statement and reservation as Mr. Bromley?

Mr. VARIAN. Yes, sir.

1930 Justice STEPHENS. And that is what you mean also, Mr. Oliver?

Mr. OLIVER. I will adopt Mr. Bromley's and Mr. Adams' statements.

Mr. VARIAN. And I do likewise.

Mr. FINCK. I also adopt the statements of Mr. Bromley and Mr. Adams.

Mr. JOHNSTON. I am not sure, if the Court please, that Mr. Bromley went this far, but I don't think that we ever got any bulletins.

Justice STEPHENS. Of course Mr. Bromley did not admit receiving bulletins. He would not be admitting re-



ceiving them, but sending them, if they were sent.

Mr. JOHNSTON. We want the record to show that it is our contention that we didn't get them.

Justice STEPHENS. The exhibits are received in evidence but the record may show that the defendants other than U. S. G. do not admit receiving the bulletins. They are also received in evidence subject to the right of the defendants to check them as to accuracy.

(The documents referred to, marked as Govt. Exhibits 249, 250, 251, 252 and 253, were received in evidence.)

Mr. STEFFEN. We would like to make a short statement in connection with Exhibit 247. The attachment to Exhibit 247 appears to be an identical copy of a United States Gypsum bulletin appearing in Exhibit 250, on the last page of that book, and it is dated 10/30/34.

I think we will request the afternoon recess at this time, Your Honor. We are about to go into other subject matter.

Justice STEPHENS. Very well, we will recess until tomorrow morning at 10 o'clock.

Mr. KNUFF. If Your Honor pleases, may I take the last five exhibits out with me in order to check up on something?

Justice STEPHENS. Yes, Mr. Knuff, you may do so.

Announce the recess.

(Whereupon, at 3:50 o'clock p.m., the hearing was recessed until Thursday morning, December 16, 1943, at 10:00 o'clock.)

1932 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 8017

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UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
WASHINGTON, D. C., THURSDAY, DECEMBER 16, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

1936 You may proceed.

Mr. BROMLEY. There is one other matter, if Your Honor pleases.

At page 2153, at the very bottom of the page, in connection with my objection, which was thereafter sustained, I moved to strike out all testimony with respect to the North Holston plant. There seems to be no ruling on that motion to strike in the decision of the Court on page 2201, which decision was limited to ruling on the objection to the exhibits.

I should like to call the Court's attention to the fact that if the objection was sustained, it seems to me the testimony with respect to the North Holston plant, which precedes pages 2153 for several pages, should be stricken out in response to the motion that I made at the bottom of page 2153.

Justice STEPHENS. Well, there were a number of exhibits marked—I am not sure that they were offered—in connection with that same line of testimony. The Court didn't make any announcement of a ruling on those particular items, because the Court thought counsel for the Government, in view of the importance of the question to the Government's case, would probably prepare an offer of proof to make a record.

Mr. STEFFEN. We will make an offer of proof this morning, Your Honor, and we would rather that the ruling on the testimony be deferred until that time.

Justice STEPHENS. That may be done.

Mr. KNUFF. There is one additional correction, Your Honor.

On page 2156, line 13, Mr. Steffen did say "mines", but I believe he meant to say "mills".

Justice STEPHENS. That should be changed to "mills". That change may be made.

At page 2201, perhaps the Court ought to call attention to one other matter, in order that there may be no possible

misunderstanding of the Court's ruling.

The Court said, it will be noted:

"The Court has considered the contentions of counsel on the matter now before the Court, which is a question whether, with the pleadings, there is admissible evidence offered to prove the fixing of resale prices upon board, gypsum board, purchased by one of the defendant licensees from another.

"The Court is of the view that within the fair intendment of the pleadings, such evidence is not admissible."

Then I said, in another sentence, that the Government 1938 may protect its record by making a formal offer of proof.

That ruling, we thought, was entirely clear. But counsel for the Government then interpolated the question:

"Would Your Honors' ruling also be made explicit that we are not entitled to introduce evidence of resale price for purposes of showing that the defendants have concertedly fixed and maintained uniform prices within paragraph 45 (a)?"

The Court understood counsel for the Government to mean, when he referred to "resale price", the resale price of board bought by one defendant licensee from another, and therefore answered:

"Yes, we think the ruling goes that far. You may make an offer broad enough to protect your record in that respect."

In case there is any possible misunderstanding, of course the ruling does not intend to forbid the Government from attempting to prove the allegations of paragraph 45 (a). The ruling is that it is not within the fair intendment of the pleadings to prove, as a part of the Government's case, that there was price fixing upon board bought by one defendant licensee from another.

I suppose, perhaps, on the whole the Court's ruling is entirely clear, but the Court thought perhaps that would be a desirable explanation.

The Court notes with embarrassment and regret that most of the corrections are in the Court's portion 1939 of the record. Perhaps the Court doesn't talk clearly, or talks too much.

You may proceed, gentlemen.

Mr. STEFFEN. I might say, Your Honor, that we will proceed through this evidence concerning metallized board, and then come back to the matter of the offer of proof on the North Holston evidence, if that is agreeable.

Justice STEPHENS. That is quite all right.

Thereupon, CLAUDE OLIVER BROWN, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. STEFFEN.

Q. Yesterday, Mr. Brown, we introduced in evidence two memoranda concerning metallized board which were sent out on December 3, 1934, or thereabouts, one of them being marked Exhibit 248 and the other being marked Exhibit 247, which carried instructions to salesmen as to metallized board and as to the prices at which metallized board would be sold.

I now want to show you Government's Exhibit No. 254, which purports to be a memorandum from Mr. Van Hagan to various individuals, under date of November 26, 1934.

Justice JACKSON. What number did you give that, Mr. Steffen?

1940 Mr. STEFFEN. Exhibit No. 254.

Justice JACKSON. I thought the last one was 248.

Mr. STEFFEN. No, the two that I was calling his attention to were 247 and 248, and then we introduced, I believe, a series of exhibits concerning bulletins.

Justice JACKSON. Oh, yes, that is right.

Justice STEPHENS. Where is this Exhibit 254, in our file here?

Mr. STEFFEN. It follows the contracts in the folder.

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit 254, Mr. Brown?

A. Yes, sir.

Q. And are you familiar with the subject matter?

A. Not before reading this, no, sir.

Q. Could you tell us who the individuals are who are described in the left-hand upper portion of the letter?

A. I think they were plant managers.

Q. Certain-teed plant managers?

A. Yes, sir.

Q. At the points listed, Acme, Akron, Fort Dodge, Grand Rapids, and Gypsum?

A. Yes, sir.

Q. And who was Mr. Phelps, and who was Mr. Hog-gatt?

A. Mr. Phelps was Advertising Manager, and Mr. Hog-gatt was an assistant to Mr. Van Hagan.



1941 Q. And I notice that it says copy to C. O. Brown. Did you receive this copy, do you remember?

A. I don't remember.

Q. Would this be in the usual form for notices to go out to plant managers and to other persons?

A. Yes, sir.

Q. Do you recall whether the company had actually signed the contract at about this time?

A. No, sir, I do not.

Q. For your information, Government's Exhibit No. 20 is the contract, which was signed on November 2, 1934.

Mr. STEFFEN. Your Honor, we offer Government's Exhibit 254 as being circumstantially identified. It is the form of memorandum that would be used for transmitting information of this character; it is dated shortly after the contract with USG was signed; and it recites that the "company has recently signed" a metallized board contract. And it was, of course, taken from the files of the Certain-teed Products Corporation.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation—I am sorry, Mr. Adams, I thought you had decided not to object.

Mr. ADAMS. No, I didn't want to interrupt you.

I have an objection on the ground that no proper foundation has been laid.

1942 Justice STEPHENS. The objection is overruled.

Mr. ADAMS. And also the usual objection.

Justice STEPHENS. The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 254, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibits Nos. 255 and 256. Exhibit 255 purports to be a letter from the Assistant Auditor addressed to Mr. Irwin, of the USG, under date of March 26, 1935. Exhibit 256 purports to be a reply by Mr. Irwin addressed to the Certain-teed Products Corporation, under date of April 4, 1935. I would ask you to examine those letters, and I will ask you a question or two concerning them.

Are you familiar with either of the letters?

A. No, sir.

Q. Do you know the signature of Mr. Irwin, on the U. S. Gypsum Company letter?

A. No, sir, I do not.

Q. Could you state whether or not the company was manufacturing metallized board, or metallized lath, at this time?

1943 A. I don't remember.

Q. Do you know when the company commenced making metallized lath?

A. I do not. I don't think they made it until I left.

Q. And you left when?

A. January 1, 1937.

Q. Did they sell metallized lath during the period that you were there?

A. Yes, sir.

Q. And do you know where they obtained it?

A. Some of it, from the United States Gypsum Company.

Q. Did they buy from anyone else?

A. I don't know.

Mr. STEFFEN. Will you stipulate that that is Mr. Irwin's signature, Mr. Bromley?

Mr. BROMLEY. Yes.

Justice STEPHENS. The Court didn't hear that.

Mr. STEFFEN. I asked Mr. Bromley if he would stipulate that that was Mr. Irwin's signature, and he replied that he would.

We now offer Government's Exhibits 255 and 256, as being circumstantially identified—that is, 255 as being circumstantially identified, and 256 has been stipulated to be a letter written by the Assistant Comptroller of the United States Gypsum Company to the Certain-teed Products Corporation. It is in reply to the letter of March 26, 1944 1935, which is Government's Exhibit 255.

Justice STEPHENS. They may be received.

Mr. BROMLEY. Subject to the usual objections?

Justice STEPHENS. Subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 255 and 256, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 257, which purports to be a memorandum from Mr. Flinn addressed to Mr. H. H. Van Hagan, under date of November 17, 1936, copy for Mr. Warren Henley.

Have you examined Government's Exhibit No. 257, Mr. Brown?

A. Yes, sir.

Q. Who is Mr. E. L. Flinn?

A. I think he was manager of the Fort Dodge plant.

Q. Are you familiar with the subject matter of the exhibit?

A. No, sir.

Q. Is it upon the usual form?

A. Yes, sir.

1945 Mr. STEFFEN. We offer Government's Exhibit No. 257 in evidence, as being circumstantially identified in connection with the two exhibits which have previously been admitted, 255 and 256. The name "Flinn" is that of a plant manager, and it is addressed in the usual form to the production manager, Mr. Van Hagan, copy for Mr. Warren Henley. It has to do with the amount of metallized board which was purchased by the Certain-teed Company during the two years in question, 1935 and 1936.

It has been testified that board was purchased outside from other parties during the same period.

Justice GARRETT. Does "reflective gypsum lath" mean the same as "metallized lath"?

Mr. STEFFEN. Yes, Your Honor.

Mr. ADAMS. We object to this, Your Honor. We don't see that it is identified by any circumstance. This witness knows absolutely nothing about this exhibit, and unless you can call it a circumstance that it happens to be on a form similar to the form used in other exhibits, there is nothing else that in any way identifies this exhibit. And I wish to call the Court's attention to the fact that it does not seem proper to us to try to identify an exhibit merely because the exhibit itself refers to something which might be relevant to this case.

Also, I wish to call to the Court's attention that this is not an original. I have, myself, just looked at  
1946 the paper before the witness, and I see that it is a copy of an original, it is not an original paper, and we have no way of telling whether or not the original paper which actually may have been sent to other people, may have been changed on its face, as has happened with a number of exhibits in this case.

Therefore, it seems to us perfectly clear that we should not be bound by this type of exhibit, particularly, Your Honor,—and again I have to refer to the fact,—since we are dealing with a memorandum here addressed to somebody that is now dead, we don't have the original that the man got, and we have no way of knowing whether this is

an authentic exhibit or whether it isn't.

And I again think that I am warranted in saying that we not only have come close to the line, but it seems to me that we have crossed it, with respect to this exhibit.

Mr. STEFFEN. I would like to ask Mr. Adams what he meant by the statement that many of these exhibits have been changed on their face? I don't understand that.

Mr. ADAMS. Well, Mr. C. O. Brown, for example, with respect to a memorandum that he made, testified that there were a number of interlineations and changes made in his handwriting on the face of the exhibit.

Mr. STEFFEN. Is that what you referred to?

1947 Mr. ADAMS. Yes, that type of change, which may have been made at the time, by somebody in the company.

Mr. STEFFEN. That being immaterial, we will let it go.

Justice STEPHENS. Does the Government wish to be heard further?

Mr. STEFFEN. No, Your Honor.

Justice STEPHENS. We think this is not admissible, that the circumstantial identification is not sufficient. The previous exhibits have been fairly closely connected in time and subject matter to each other —

Mr. STEFFEN (interposing). I think, Your Honor —

Justice STEPHENS (interposing). Let me complete the ruling, please.

Mr. STEFFEN. Excuse me.

Justice STEPHENS. We think also that the objection, which in effect is an objection that it is not the best evidence, is well taken. It is a copy. The absence of the original is not accounted for, and the correctness of the copy is not testified to.

Did you have something further, Mr. Steffen?

Mr. STEFFEN. I would like to be heard later on that matter of the best evidence. Our contention throughout is going to be, of course, that whether it is a carbon or an original in the possession of the defendants, it is evidence concerning the matters recited in the paper. This is not a

1948 matter of suing upon a contract for purposes of determining whether or not the other party is liable.

This is a question of showing what the defendants knew, and what they asserted, and a declaration can be made either in carbon or in original.

Therefore, while you have ruled upon that in this case, I would like to enter a caveat that in cases to come later,



we do not wish to be bound by whether it is an original or a carbon.

Justice STEPHENS. We will not stand upon ceremony. If you wish to be heard on that objection on this exhibit, you may be heard.

Mr. STEFFEN. Not on this exhibit.

Justice STEPHENS. The Court realizes that these are not being introduced as copies of contracts are introduced. Yet they are being introduced as declarations, and their correctness as declarations is of some importance to the parties. The usual best evidence rule is that if the copy is to be introduced, in view of the fact that a copy may have been different from the original because of interlineations and changes in the original, that the correctness of the copy should be testified to.

What do you intend to prove by this, Mr. Steffen?

Mr. STEFFEN. What we wanted to establish by it was that there was a purchase of so much lath during the years 1935 and 1936. That comes in, as we see it, as admissions on the part of the defendant that they did buy it.

1949 Justice STEPHENS. If you hadn't said the purchase of "so much" lath, your argument would have been a little more convincing to me. When you say "so much", then you get into the exact correctness of the copy.

Mr. STEFFEN. We don't offer it as to the truth of the matter, but simply as to what they admit.

Justice STEPHENS. You offer it simply to show that some was purchased.

Mr. STEFFEN. That is right.

Justice STEPHENS. That has already been testified to. Is there any dispute about that, Mr. Adams?

Mr. ADAMS. No, the witness has testified that they purchased some, and I certainly agree with his testimony.

Mr. STEFFEN. I will ask to have Mr. Adams produce the figures indicating just what metallized board or reflective lath was purchased by the Certain-teed Products Corporation from the time they signed their contract with USG until the present date.

Mr. ADAMS. I will reply that that is information which I can tell the Court now we can't produce. At the time we argued the question of the interrogatories. I went extensively into the facts with respect to the conditions of the records of our company. I might also say that in connection with the preparation of the trial itself, on this  
1950 point, I endeavored to secure this information from my client, and was unable to do so.

Justice STEPHENS. Were you through, Mr. Adams?

Mr. ADAMS. That is all.

Justice STEPHENS. Of what importance, Mr. Steffen, is the amount? Isn't it the fact of purchase that is material?

Mr. STEFFEN. The fact is, of course, the material thing. I don't want to be met, as I perhaps will be met a little later, with an argument from Mr. Adams that it was just a small amount, not substantial, and the Government didn't prove it anyway, and therefore this is of no consequence. I do not want precise figures. I would like to have a statement from Mr. Adams that during the years that they have been buying board, from 1934 on to the present date, they have bought, each year, substantial quantities from

USG or from National or from any other licensee.

1951 Justice STEPHENS. It would seem to the Court, speaking in the interest of time, that a good deal of time could be saved on much of the subject-matter that is being gone into through these exhibits and with these witnesses. There can hardly be any dispute, can there, Mr. Adams, as to the fact that there was a substantial amount of metallized lath purchased during the period of years in issue in the case?

Mr. ADAMS. Oh, yes, your Honor.

Justice STEPHENS. There is a dispute on that?

Mr. ADAMS. A very serious dispute. We do not concede that there was any substantial amount purchased. The best information that I have been able to get was that it was a decidedly small amount.

Perhaps I can explain that by saying that it is my understanding that this was a new product which was just coming in, and that during the period in which we were not actually in production, but were putting our plant in position so we could produce. As I understand it a quantity, which I am informed—I have no way of verifying it—was a small quantity of this merchandise, was purchased from time to time. But I am unable, unfortunately, to state that we purchased substantial quantities because my information is precisely to the contrary.

Justice STEPHENS. Do you have any knowledge on this subject, Mr. Brown, of how much or how little of this metallized board was purchased during the period of 1952 years which we are now discussing?

The WITNESS. I don't have any definite figures, your Honor. It was a new product, as Mr. Adams states, and had not been promoted to the trade, and I don't think

our sales were what you would call "substantial".

Mr. STEFFEN. I object to the answer, "substantial". What would you say was "substantial", Mr. Brown? Would \$25,000 be substantial or not?

The WITNESS. I wouldn't think so —

Justice STEPHENS (interposing). A pleasantry will sometimes relieve the weary atmosphere of a courtroom.

Counsel's objection reminds me of an occurrence in a court in which I practiced some time ago, where a lawyer, in respect to a question asked by a judge, said, "If it is asked on our behalf, we withdraw the question, and if on our opponent's behalf, we object to it". (Laughter.)

In this instance the Court, in the interests of all persons, was trying to save time.

What do you mean by "substantial", Mr. Brown?

The WITNESS. I would say a million dollars would be substantial.

Mr. STEFFEN. I will agree with that, your Honor.

Justice STEPHENS. You may proceed with the witness, Mr. Steffen. You may interrogate the witness more closely than the Court cares to do, within his memory, 1953 as to the amount of this material that was purchased and shipped.

Mr. STEFFEN. As I understand the witness' response, \$25,000 is not substantial, and \$1,000,000 is.

By Mr. STEFFEN.

Q. Can you get any closer than that?

A. I don't think it would improve the record.

Q. I don't think so either.

Mr. STEFFEN. Your Honor, we have asked defense counsel, Mr. Adams, to produce the actual figures, and he has stated here, as he has stated elsewhere, that he is unable to get any figures. Now the fact of the matter is that they make reports, and did make reports, to the United States Gypsum Company of the amounts purchased, and those figures in general should be obtainable.

If your Honor will rule that they shall be presented, I think it will save time.

Justice STEPHENS. The Court will rule that they shall be presented if they can be presented. The Court is not in position to deny the assertion of Mr. Adams that he cannot get at them, so far as the records of his clients are concerned, there having been a change in management and ownership.

How about the United States Gypsum Company, can't

you produce them, Mr. Bromley?

Mr. BROMLEY. No, your Honor. In the first place, Mr. Steffen's statement is not correct. There were no 1954 reports of purchased foil board made by Certain-teed to us, or vice versa. If there had been, that would have been very easy for us to get the information and furnish it. But that is not the fact. When we answered the interrogatory, No. 44, with respect to this question, we said, "It is not possible to state without examination of the invoices the volume in board feet and the dollar sales value of metallized board sold by USG to each of the companies named as defendants in this action".

And as we argued on the motion to settle the interrogatories, that means an examination of all the invoices because the metallized board was not carried on separate invoices. That is the difficulty we are in and that is why we cannot do it.

Mr. STEFFEN. May I say that we of course respect Mr. Bromley's statement and Mr. Adams' statement fully, but on the other hand we doubt the accuracy of those statements, and we would ask that we be permitted to put an auditor in on the books of United States Gypsum Company and/or Certain-teed to examine the books to determine just how much metallized lath was sold during those several years. I have no question but that in gross amounts they have some records, apart from their invoices, which show how much board, how much metallized board they manufactured and how much metallized board they sold, and how much metallized board they sold to Certain-teed, or how much Certain-teed bought, and we will be very glad to put a man in who I think can disclose that information pretty shortly.

Mr. ADAMS. I might observe at the outset, your Honor, that if this Court is going to wait until an auditor goes over the invoices of United States Gypsum and Certain-teed on this subject, I for one am going to have a long gray beard. This case is not going to be finished in that event for several years.

I don't mean, in saying that, that I should be deemed to agree that any such practice should be followed. The Government has had this case three years. They subpoenaed some 500,000 documents, including everything we had in the whole place, as far as I can find out. This information is not available. Mr. Bromley's statement is the fact with respect to our company. When we bought something we got bills that may have contained ten or fifteen items.



Secondly, we do not have those bills so far as I know. We have here in this courtroom everything that we have on this subject. It begins in 1935 when we began to manufacture board and shows from that time on. Up to that point we don't have anything.

Justice STEPHENS. The Court will of course hear you if you have any authorities to present on this subject, Mr. Steffen, but we, as presently advised, know of no power in the Court to order an audit into the office of a party to the case for an examination. Many audits are made of books of defendants in these cases.

1956 If I may refer to personal experience, when I was Assistant Attorney General, and head of the Anti-Trust Division, that was done by consent, it was done as a result of the fact that the courts had power to issue subpoenas, and ordinarily the defendants consented to have an examination of their books rather than have their books removed from their possession.

But, as presently advised we doubt whether we have the power to order an auditor into anyone's offices.

Maybe there is some special provision in the new Rules on the subject which gives us that authority, and if so we would like to have our attention called to it.

Mr. KNUFF. Would you let me have just a minute, and I think I can call your attention to the rule?

Justice STEPHENS. Yes. It sounds to me like search and seizure.

Mr. STEFFEN. You can see the situation we are in otherwise; we have to simply take the word of counsel on matters which we are very glad to do ordinarily —

Justice STEPHENS (interposing). You can subpoena the invoices, can't you?

Mr. STEFFEN. We have a large number of invoices, but that is not the way to get your general information concerning the amount of board made and sold.

Justice STEPHENS. Well, the Court must —

1957 Mr. ADAMS (interposing). I am not sure, your

Honor, but I think they have got such invoices as we have right now. I am not clear about it but it seems to me they subpoenaed them, and I think they still have them.

Mr. STEFFEN. We have a few invoices, and they will come up immediately.

Mr. ADAMS. I think they got a good many thousand of them.

Justice STEPHENS. The Court is unable to determine this question of fact. One counsel says that these are easily

furnished by opposite counsel; and the other side gives us the word of counsel that they are not. We have no way of determining that issue of fact.

Mr. STEFFEN. I call your Honor's attention to Rule 34 of the Rules of Civil Procedure:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

We say that within that rule your Honors can order the defendants to permit us to have an auditor inspect the books of the defendant companies, and to ascertain the fact of the matter which is in dispute here, whether or not those books show purchases of reflective board from United States Gypsum by the Certain-teed Corporation, and in what amount.

Justice STEPHENS. The Court is ready to rule on this matter unless counsel wish to be heard further.

The Court is of the view that Rule 34 does not cover the situation involved.

Rule 34 (1) provides that the Court may "order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control."

Now that is obviously that part of the rule which is intended to apply to documents such as invoices and records of the type which we are now discussing, and that gives the Court authority to order any party to produce and permit the inspection or copying of them,

but it is well settled law that the Court cannot compel any party to do the impossible. It is a defense even in a contempt proceeding, to show that the party cannot perform the act ordered.

Now the Court is dealing with officers of the court whose word the Court must accept as correct. The Court has no reason to doubt the assurances of Mr. Bromley or Mr. Adams that they cannot produce this material without such undue effort in examining invoices that the Court cannot properly require it.

That whole matter was gone into on the interrogatories.

The second portion of the rule obviously does not apply to documents. It applies to "entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon".

That has to do, obviously, with physical things in the nature of property in the usual sense of the term, and the first part of the rule has to do with documents.

We do not think it would be proper for the Court to order the production of documents which counsel give their solemn assurance they cannot produce without such undue effort as goes beyond the reasonable requirements of the law.

1960 This may be one of those situations where the Government is confronted with an inability to produce or get at evidence. That sometimes occurs in any case and confronts every party, and it may be evidence which the party believes to exist but which nevertheless cannot be reached.

The motion is denied for the reasons stated by the Court.

Are there any other witnesses who might be called on this subject from Certain-teed, Mr. Adams, who might have more knowledge than Mr. Brown on this subject? We wish to give the Government every proper opportunity to get at its evidence.

Mr. ADAMS. If your Honor pleases, I took up with the man who had been in the company the longest —

Mr. STEFFEN (interposing). What was his name?

Mr. ADAMS. Mr. Norman Muegger, and I think we have already furnished his name to the Government—and I also took it up with the head of his department, who was not in the company during this period, and they spent a long time trying to assemble this information and they told me that they didn't have it and couldn't get it.

I also took it up with Mr. Galloway, who was the head of the sales department, and Mr. Galloway gave me the same information.

As a matter of fact, at my special request a further search was made by Mr. Galloway's department just before this case began. I went to Chicago in connection with the preparation of the case, and we particularly went into this phase of it.

Now those men can be subpoenaed but they will testify, I am sure, to what I have already stated to the Court.

Of course I have no objection to their testifying on the subject. As far as I am concerned, if I can get this information for the Court I am glad to produce it. I don't think it is going to make much difference in the case anyway, and I don't think it is awfully important, but it is one of those things that we just haven't got and can't give you.

Mr. STEFFEN. I wonder if Mr. Bromley would make a similar statement to the effect that the United States Gypsum has no records indicating that they ever sold metalized board to Certain-teed Products in any quantity?

Mr. ADAMS. Just a minute, I don't want to be understood as having made the statement that we have no records. We have all said that this question of the invoices would require the examination of many hundreds of thousands of invoices. I can't say that there are no records, but I can say that there are no records that we can produce on the subject.

Mr. BROMLEY. All I know about it is what the interrogatory states, and I assume that a careful investigation was made at that time before that answer to the interrogatory was given.

I am willing to initiate another inquiry to see if there is not some way we can furnish either a generalization or an approximation or an estimate, or something else.

Of course it must be remembered that this request now is only as to Certain-teed, but it undoubtedly will be followed by a request as to every company. So that I am undertaking a pretty heavy burden and I don't want anyone to think that it is just Certain-teed that it is confined to. But I am willing to reinitiate the inquiry and see if there is not some way in which we can arrive at a figure.

Justice STEPHENS. That is a fair offer, Mr. Steffen.

Mr. STEFFEN. I accept that as a fair offer, your Honor.



Justice STEPHENS. The Court cannot ask more than that, it seems to the Court, of the defendants, in view of the efforts they have already made.

The Court will take its recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. In view of the difficulty, your Honor, of obtaining any evidence at all concerning the amount of metalized board purchased during 1935 and 1936, would that have any bearing on making this Exhibit 257 now the best evidence?

Justice STEPHENS. There is still the question of identification and the question of correctness. The inability to produce the original lays the foundation for the introduction of secondary evidence, but the secondary evidence will have to be shown to be correct, and now that you lay emphasis upon the amount involved, that emphasizes the necessity of having correct copies. Also there is the question of identification. So the Court's ruling will stand.

Mr. STEFFEN. I want to make just one observation, that all of these documents were subpoenaed. This is all that was returned to the Government. We do not know where the original is, and the defendants did not supply the original under the subpoena.

Justice STEPHENS. That may be shown of record.

By Mr. STEFFEN.

Q. I will now show you, Mr. Brown, a series of exhibits which purport to be invoices of the Certain-teed Products Company to various buyers, and I will have them marked serially beginning with Exhibit 258.

Exhibit 258 is a purported invoice from the Certain-teed Products Corporation to Pinellas Lumber Company under date of 9-8-37.

Exhibit 259 purports to be an invoice from the Certain-teed Products Corporation to C. W. Kempkau & Company, under date of 8-12-37.

Exhibit 260 purports to be an invoice from the Certain-teed Products Company to the Witt Lumber Company, Knoxville, Tennessee, under date of 7/27/37.

1964 Exhibit 261 purports to be an invoice from the Certain-teed Products Corporation to Morris-Austin

Company, Asheville, North Carolina, under date of December 16, 1936.

Exhibit No. 262 purports to be an invoice from the Certain-teed Products Corporation to the Smith-Kelly Supply Company, Inc., of Mobile, Alabama, under date of September 27, 1937.

Exhibit 263 for identification purports to be an invoice from the Certain-teed Products Corporation to the Smith Kelly Supply Company, Mobile, Alabama, under date of August 17, 1937.

Exhibit 264 purports to be another invoice from the Certain-teed Products Corporation to the Smith Kelly Company under date of July 7, 1937.

Exhibit 265 purports to be an invoice from Certain-teed Products Corporation to the Campbell Coal Company, Atlanta, Georgia, under date of July 28, 1937.

Exhibit No. 266 purports to be another invoice from the Certain-teed Products Corporation to the Campbell Coal Company under date of July 15, 1937.

Justice STEPHENS. Mr. Adams, these appear to be invoices. Is there any possibility of stipulating as to the correctness of these, in order to save all this examination?

Mr. ADAMS. Well, I am perfectly certain that the witness cannot testify about them at all, because he had left the employ of the company at the time they were made. He left the employ of the company on January 1, 1937.

1965 Mr. STEFFEN. He can identify Certain-teed Products Corporation, invoices whether he was there or not.

Mr. ADAMS. I don't quite understand how.

Justice STEPHENS. Well, at the moment the Court is asking if you couldn't stipulate as to the correctness of these.

Mr. ADAMS. I am really at a loss as to know what to say, your Honor. I would like to perhaps suggest this, that I have an opportunity to verify them. I have never seen them before this proceeding. Your Honor knows my difficulties in this case, and I cannot say whether they are valid or not because one difficulty that I have is that they may have been invoices which were subject to correction or change in some respect.

Justice STEPHENS. Where did you get them, Mr. Steffen?

Mr. STEFFEN. Under subpoena from the Certain-teed Products Corporation, and I have just gone through and picked out a handful of them.

Justice STEPHENS. Did you get these documents, or are these photostats of them?

Mr. STEFFEN. I got the originals which Mr. Brown has before him.

Justice STEPHENS. The Court must apply the rules of evidence. The Court would think that this type of exhibit which is an office form, if the originals are available for inspection of counsel, might possibly be stipulated to.

The Court does not require it, of course, but suggests 1966 it and hopes that it can be done.

Mr. STEFFEN. I call your Honor's attention to the fact that Exhibit 261 is a 1936 invoice, if that is important, and was issued during the time when Mr. Brown was still with the company.

Mr. ADAMS. I think your Honor's idea here is proper, that it is certainly desirable not to hold up the trial by a matter of this kind. I think that the best thing for me to do is to concede that these are copies of invoices which were taken from the files of Certain-teed.

I cannot concede, and do not wish to be understood as conceding, that they are accurate or that the amounts stated thereon represent the prices charged or the amounts received for the merchandise which is referred to on the face of the invoices.

I should also like to have the privilege, if possible, as we have had with respect to other exhibits, of having a further check if there is anything we can check them with.

Justice STEPHENS. Are they not originals?

Mr. ADAMS. These appear to be copies, your Honor. I take it that they would be copies.

Justice STEPHENS. The originals went to the customers, of course.

Mr. ADAMS. Yes. They had many different copies that went to different departments. I notice that this 1967 bears the stamp, "Received—Atlanta, Georgia—Certain-teed Products Corporation". This probably was a copy that went down to a local office from which the merchandise had been sold. I just surmise that that is the case.

But as far as the question of their being invoices and having come from our office is concerned, I raise no question about that at all.

Justice STEPHENS. Is there any one of your officers here with whom you can consult on the subject of their authenticity?

Mr. ADAMS. There is not any present officer of the company here. Mr. Whittemore is among the many other witnesses that are waiting to be heard, and I can take that up with him.

Justice STEPHENS. What do you offer to prove by these, Mr. Steffen?

Mr. STEFFEN. I would like to have them identified first, and then I will ask the witness a question.

Justice STEPHENS. Very well, proceed.

Mr. STEFFEN. I think it is fairly obvious that Mr. Adams doesn't know anything about the invoices, because they were company records, so that he can't concede their accuracy.

By Mr. STEFFEN.

Q. Now, Mr. Brown, I would like to ask you to examine these invoices, please.

Mr. STEFFEN. I would point out to your Honor that the defendants have been telling the Court that the 1968 way to establish these facts concerning purchases of board or sales of board would be to look at the invoice, and I think these invoices will disclose certain evidence concerning both the sale of reflective lath and also evidence concerning the source of the reflective lath.

By Mr. STEFFEN.

Q. Will you examine them, please, Mr. Brown, and tell us whether or not, examining first Government's Exhibit No. 261, which is the one dated December 16, 1936, showing a sale to the Morris-Austin Company, and then examining the others, you can identify them as being the usual form of invoices of the Certain-teed Products Corporation?

A. They appear to be the type of invoice used when I was with the company.

Q. And the company kept these in its permanent records, did it?

A. Naturally, yes, sir.

Q. The original goes to the customer?

A. Yes, sir, it is supposed to.

Q. You can identify each one as being in the form which the company employed —

A. (Interposing.) I wasn't with the company when these were issued, except as to one, but I can identify them as appearing to be the form.

1969 Justice STEPHENS. You might ask the witness, if the Court might suggest, what sort of machine these



things were prepared upon, whether they were prepared upon a mechanical bookkeeping machine, or typed, or in what manner they were prepared. That might aid with respect to their authenticity.

The WITNESS. I think that the correct term is a Fan-Fold billing machine.

Mr. ADAMS. Of course, Judge, I have tried to indicate that I do not raise any question about their being copies of invoices taken from our files.

By Mr. STEFFEN.

Q. Now, Mr. Brown, I would like to ask you to look at Government's Exhibit 258 and explain the transaction that is evidenced there. That is the invoice of September 8, 1937.

Mr. ADAMS. To that I must object because he was not employed by the company at that time.

Justice STEPHENS. What is the question?

Mr. STEFFEN. I asked him to look at Government's Exhibit 258 and explain the transaction that is evidenced there. Mr. Adams knows well that anybody can explain it, whether he was employed or not employed at the time, if he has the information and knowledge.

Justice STEPHENS. If you know what transaction this invoice purports to describe, explain it. If you do not, say you do not.

1970 The WITNESS. I think that is a very broad question, your Honor, and you have men under subpoena, or the Court has, that were in charge during this period.

By Mr. STEFFEN.

Q. You were in charge of sales, were you, Mr. Brown?

A. Yes, sir.

Q. Was Mr. George M. Brown in charge of sales?

A. I wouldn't classify him as being in charge of sales.

Mr. STEFFEN. May I ask the Court to direct the witness to state whether he knows or doesn't know what this transaction —

Justice STEPHENS (interposing). The witness has in effect answered that he doesn't know.

Justice JACKSON. Don't you know what that is, what that Exhibit 258 means?

The WITNESS. Yes, your Honor, that is an invoice.

Justice JACKSON. That is the question.

The WITNESS. He asked me to explain it in detail.

Justice JACKSON. No, he is asking you to explain what you mean by this.

The WITNESS. I misunderstood the question, I am sorry.

By Mr. STEFFEN.

Q. What is meant by, "Acme full freight allowed", if you know, appearing on the left, "FOB Acme full freight allowed"?

A. The products were sold on a delivered price, but the bill is usually on the basis of f.o.b. mill, freight allowed, which means that you deduct the freight from the delivered price and the customer pays it.

Q. Point out on this invoice what was the delivered price.

A. Apparently it was \$158.94.

Justice STEPHENS. This is what, Exhibit 261?

The WITNESS. Exhibit 258.

By Mr. STEFFEN.

Q. \$158.94, you say?

A. Yes, sir.

Q. Now it says, "Less freight—\$65.61"—where do they get that item?

A. That was the freight from shipping point to destination.

Q. And the shipping point was Acme?

A. Yes, sir, it shows f.o.b. Acme.

Q. Therefore it would be from Acme, Texas, to St. Petersburg, Florida?

A. Yes, sir.

Q. What is meant by this "freight absorption" thing on the lower left-hand corner?

A. Well, gypsum products were sold on a delivered price, freight equalized with any other producing point. Some other gypsum mill evidently had a rate of \$7 per ton into St. Petersburg, Florida.

1972 Q. All right, now explain the transaction —

A. (Interposing.) Therefore, in buying from Certain-teed he had to pay \$9.38, so in order to compete Certain-teed would absorb the difference of \$2.38.

Q. Now that basic rate, the \$7 was from some other plant, you say?

A. Yes, sir.

Q. And do you know what plant that might have been?

A. I don't remember without looking up the freight rates.

Justice STEPHENS. You mean some other Certain-teed plant?

The WITNESS. Any other plant, your Honor.

Justice STEPHENS. Any other plant?

The WITNESS. Yes.

By Mr. STEFFEN.

Q. Is it any other plant, or is it a specified plant?

A. Well, it would be any plant that made the lowest rate into there. It could be a Certain-teed plant.

Q. How do you happen to select the particular plant, is it specified in the United States Gypsum price bulletins?

A. It is shown in the freight bulletins.

Q. No, I am asking if it appears in the price bulletins which the U. S. Gypsum Company issued to licensees.

A. I don't know, I don't really get the question.

Q. Well, I wanted to know why you selected a particular plant here where there was a \$7 rate.

1973 A. Well, if there was a plant at Plasterco, for example, that had a rate of \$7 to destination, and that was the lowest rate in existence, that would be the rate you would use.

Q. You mean by "lowest rate in existence", the lowest rate between Plasterco and St. Petersburg?

A. The lowest rate from any gypsum plant to destination.

Q. This invoice No. 258, Exhibit 258, calls for 157 bundles of Beaver gypsum lath, and it is marked, "Metallize one side"—is that metallized board as we have been calling it?

A. I think so.

Q. And can you tell by looking at the invoice whether it was manufactured by Certain-teed or whether it was bought from outside parties?

A. No, sir, I cannot do that.

Q. What do the initials "O S P" mean appearing after "Metallized one side"?

A. I wouldn't know except from an exhibit you showed me during the recess.

Q. Well, I will show you the exhibit again which I showed you during the recess.

I show you for purposes of refreshing your recollection, certain documents, and ask you what they are, first, if you know.

A. They appear to be loading tallies.

Q. Do you find on those loading tallies the initials  
1974 "O S P"?

A. Yes, sir.

Q. And is that followed by further language?

A. Yes, sir.

Q. State the language.

A. Purchased from —

Mr. ADAMS. (Interposing.) I object to it, if your Honor please, until I have had an opportunity to see the exhibit.

Justice STEPHENS. You may look at it.

(Mr. Adams examines document.)

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You may proceed, gentlemen.

By Mr. STEFFEN.

Q. I asked you, I believe, if you could tell us what "O S P" means after having examined the plant or warehouse orders that I showed you.

Justice STEPHENS. You are asking what the letters "O S P" on Exhibit 258 mean?

Mr. STEFFEN. Yes.

The WITNESS. On this loading tally it reads, "O S P— purchased from USG."

Justice STEPHENS. Don't state what is on the loading tally, the loading tally is not in evidence and is not offered in evidence.

Mr. ADAMS. I move that that answer be stricken.

1975 Justice STEPHENS. That may go out.

State if you can, what the letters "O S P" on proposed Exhibit 258 mean, basing your statement on your knowledge and experience as a sales manager and businessman in this type of work. If you cannot answer, you do not have to. But if you can tell us what they mean that is what we want to know.

The WITNESS. I wouldn't have known what they meant without having had my memory refreshed by this loading tally.

1976 Justice STEPHENS. That is all right. Go ahead and tell us what they mean, as your memory is refreshed.

The WITNESS. Outside purchase.

By Mr. STEFFEN.

Q. Outside purchase would indicate —



A. (Interposing.) That they were purchased from some other company.

Mr. STEFFEN. I call your attention, Your Honor, that O S P appears on each of the invoices that we have offered here, being Government's Exhibits 258 to 266. These are by no means all of the invoices that could be offered, but they are given as an indication of invoices during this period. We offer them in evidence at this time.

Mr. BROMLEY. Does that last statement mean that they are on all the invoices you have?

Mr. STEFFEN. Oh, no. We claim there are many others with this same O S P.

Mr. BROMLEY. I thought your statement was intended to indicate that all the invoices you have are of the character of Exhibits 258 to 266, that is, they bear these letters O S P.

Mr. STEFFEN. They are of the same character, in general form, but they do not all bear O S P, by any means.

Justice STEPHENS. They may be received in evidence.

Mr. ADAMS. May that reception be subject to the reservation which I requested, Your Honor?

1977 Justice STEPHENS. Oh, yes, you may inspect them for accuracy.

Mr. BROMLEY. We make the usual objection.

Justice STEPHENS. These are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 258 to 266, both inclusive, were received in evidence.)

By Mr. STEFFEN:

Q. Now I want to ask you, Mr. Brown, some questions in regard to your salesmen. Could you tell us what the practice of the company was, during the years that you were with it, in giving prices to the salesmen at which they would quote products sold by Certain-teed?

A. We sent them a price list.

Q. And that price list covered your full line, the full line that the salesmen were selling?

A. Yes, sir.

Q. What other information of a price nature did you supply your salesmen with, if any?

A. Freight rates.

Q. What do you mean by freight rates?

1978 A. From shipping point to destination, and from

competing plants to destination.

Q. And how would the salesmen use the freight rates?

A. They would sell gypsum products on the basis of our price list plus the lowest freight rate to destination.

Q. And he would obtain that lowest freight rate from the freight rates which you supplied him?

A. From his freight rate bulletin.

Q. Did you have more than one set of prices for gypsum board or gypsum products?

A. I don't remember.

Q. I mean, when you sent out price lists, did you have a price list for one type of board, let's say  $\frac{3}{8}$  inch gypsum lath which you manufactured, and a different price list for any other board?

A. I don't think so.

Q. Single prices for your salesmen?

A. They were supposed to cover the lines, as I remember it.

Q. Coming to the metallized lath, could you say whether you quoted bulletin prices to your salesmen on metallized lath—and by "bulletin prices" I mean the prices that the United States Gypsum Company sent out in their bulletins?

Mr. ADAMS. I object to that. There has been no showing that we ever received the bulletins, and we very carefully made yesterday, when the bulletins were offered, the statement that we did not agree that we received the bulletins. I think it is assuming a fact that is not in evidence.

Justice STEPHENS. The question does, technically, assume a fact not in evidence. In other words, it asks him if he sent them out on the basis of bulletin prices received from USG. That assumes that they were received.

You may ask him whether they were received, and follow it up.

By Mr. STEFFEN.

Q. Do you recall, Mr. Brown, that you had a contract with the USG at this time, concerning metallized board?

A. I wasn't with the company at this time.

Q. I am speaking of from 1934 on through 1935 and 1936, when you were with the company.

A. I don't recall when that contract was signed.

Q. Well, I refreshed your recollection earlier here. It was on November 2, 1934. And under that contract, I will state the United States Gypsum Company reserved the

right to fix the prices on metallized board —

Mr. ADAMS (interposing). On metallized board manufactured and sold by this defendant.

Mr. STEFFEN. All right, manufactured and sold.

By Mr. STEFFEN.

Q. Now do you recall, Mr. Brown, during the years 1934, 1935 and 1936, having received any bulletins from the United States Gypsum Company concerning the sale and the sales price of metallized board?

A. I don't remember.

Mr. STEFFEN. The witness, Your Honor, appears to be failing to remember matters which he certainly should remember, as sales manager of the company over a period of years. May we cross-examine the witness?

I will point out also that Mr. Brown, as all the other witnesses that we are forced to call, is a member of the industry,—Mr. Brown has been in it for 25 years, or thereabouts,—and their natural bias, of course, would be against the plaintiff in this case.

Mr. ADAMS. There has been no suggestion, Your Honor, on the part of this or any other witness who has testified in this case, of any bias or partiality whatsoever. These witnesses have come here, for the most part, at their own expense; they have been kept sitting in this court room day after day, and I, myself, have been surprised at the good temper with which they accepted the treatment they received.

I think that there is absolutely no call for any suggestion such as has just been made by counsel for the Government, that there is any basis whatever for deeming this witness to be a hostile witness or for suggesting that there should be any right to cross-examine. Insofar as I am concerned, I don't care whether they cross-examine him or not. I am perfectly satisfied that the witness is testifying to the whole truth as he knows it.

I think, however, that I am called upon to make this statement, particularly because of the suggestion here that this witness is connected with the industry, which he is not, and has not been since January 1, 1937, and particularly because during the time he was with the company he was general sales manager and vice president during this period, and he was required to handle a multitude of details in a company that was doing some \$20,000,000 worth of business. I think that the suggestion by counsel, that because this witness can not remember whether he received price

bulletins during this period is the basis for cross-examining him, is frankly outrageous.

Justice STEPHENS. Does the Government wish to be heard further?

Mr. STEFFEN. We wish simply to say that we do not question Mr. Brown's good faith in the slightest. We think it might save time if we could go rather directly to some questions which he has shown that he has an unwilling or no memory upon.

Justice STEPHENS. There is a rule, of course, of which counsel are well aware, that counsel can not cross-examine their own witness, but that rule may be relaxed within the discretion of the Court if the witness indicates hostility.

The Court thinks this witness has not indicated hostility. If you do not object, however, as you stated, Mr. Adams, to leading questions, perhaps it will save time.

Mr. ADAMS. I am always glad to do that, Your Honor. It is simply my own sense of personal outrage at the suggestion of hostility on the part of this witness. They can go ahead and lead him all over the court room, as far as I am concerned.

Justice STEPHENS. You may lead the witness.

Mr. STEFFEN. May I say for the record that Mr. Adams' sense of personal outrage is immaterial.

Mr. ADAMS. It is extremely material to me.

Justice STEPHENS. We have had enough on that subject. Proceed.

Mr. Steffen has stated, Mr. Adams, that he intended no reflection upon the good faith of the witness.

Mr. ADAMS. I am very happy to hear that.

Justice STEPHENS. You have a right to raise your objection, but counsel for the Government has now indicated that he did not intend to indicate bad faith on the part of the witness, so that ought to end the difficulty. Let us be friends, now, and go forward.

By Mr. STEFFEN.

1983 Q. I would like to show you, Mr. Brown, Exhibit No. 247.

I now ask you, Mr. Brown, whether you at any time have ever seen any of the United States Gypsum Company price bulletins, of any kind at all.

A. Yes, sir.

Q. You are familiar with their form?

A. In a general way, I think so.



Q. I show you now Government's Exhibit No. 250, the final page in Government's Exhibit 250, under date of 10/30/34—

Justice STEPHENS (interposing). Is that one of the bulletins which was received in evidence yesterday?

Mr. STEFFEN. That is right.

By Mr. STEFFEN.

Q. (Continuing.) —And ask you to examine that and state whether you are familiar with that form?

A. I have seen them sent out in this form.

Q. Now I will ask you to examine the second page of Government's Exhibit 247. Comparing the two, the United States Gypsum Company bulletin and your notice to salesmen, do you see any difference?

A. They are both the same.

Q. Does that refresh your recollection as to whether you may have seen United States Gypsum Company bulletins upon metallized lath?

1984 Mr. ADAMS. I object to that. The question is whether or not they received the bulletins. He has testified that he has seen some bulletins.

Justice STEPHENS. The Court doesn't see the impropriety of the last question.

Read it.

(The question was read by the reporter.)

Justice STEPHENS. What is your point?

Mr. ADAMS. The point is that he has stated that he has seen them. There is no question about that.

Justice STEPHENS. You are objecting to it as repetitive?

Mr. ADAMS. That is one objection. As I understand it, what we are trying to get at with this witness is whether or not he received these bulletins.

Justice STEPHENS. The Court understood the witness to mean, when he said he had seen them, that he had seen them in the process of his business with the Certain-teed Company, but perhaps that should be brought out, Mr. Steffen.

By Mr. STEFFEN.

Q. When you said that you had seen bulletins covering metallized lath, was that in your capacity as an official of the Certain-teed Products Corporation?

A. Yes, sir.

Justice STEPHENS. The objection, for the record, is overruled. We think the question is proper. It is some evidence that they were received if this man, in his

official capacity in the business, saw them.

By Mr. STEFFEN.

Q. I want you to look at Government's Exhibit No. 248. That bulletin refers to the sale of what, Mr. Brown?

A. Metallized board.

Q. Is is board or lath?

A. Lath.

Q. And what sort of shipments does it cover?

Justice STEPHENS. The Court calls attention to the fact that it says both. The first sentence says:

"The U. S. Gypsum Company quote prices on metallized gypsum wallboard at the following points:"

Then it says:

"On gypsum lath they quote only at Oakfield \* \* \*"

Then:

"The price on gypsum metallized lath is \$20.00", and so forth.

By Mr. STEFFEN.

Q. Now I want to show you Government's Exhibit No. 249, which has been identified as a price bulletin on metallized board which the United States Gypsum Company prepared, and I would like to have you examine that and state whether or not, from that, it accords with the announcement that you sent out to salesmen which was Government's Exhibit 248?

1986 A. Apparently Exhibit 248 only makes mention of one price, which is \$20 f.o.b. Oakfield, which corresponds to this bulletin.

Q. That is the U. S. Gypsum Company bulletin on metallized board?

A. Yes.

Q. Under date of 10/30/34?

A. That is correct.

Mr. STEFFEN. Have Government's Exhibits 258 to 286 been received in evidence?

Justice STEPHENS: Yes, they have been received in evidence.

By Mr. STEFFEN.

Q. Now I should like to show you Government's Exhibit which has been marked for Identification No. 267, which purports to be a letter from Mr. Van Hagan to Mr. Rahr, under date of June 15, 1934.

Justice STEPHENS. Is that in this file, Mr. Steffen?

Mr. STEFFEN. It follows immediately after the invoice material.

Justice STEPHENS. There is a great deal of this invoice material that you skipped.

Mr. STEFFEN. I introduced merely the invoices and not the telephone orders —

Justice STEPHENS (interposing). This is a letter of June 15, 1934?

1987 Mr. STEFFEN. That is right.

Justice STEPHENS. Thank you, I have it.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit No. 267?

A. Yes, sir.

Q. Is it on the usual form?

A. Yes, sir.

Q. And it is addressed by Mr. Van Hagan to Mr. Chester E. Rahr?

A. Yes, sir.

Q. It refers to you in the next to the last paragraph, on the first page. Are you thoroughly familiar with the matter there mentioned?

A. No, sir, because it apparently applies to the question of validity of a patent —

Q. (Interposing.) No, I —

Mr. BROMLEY. (Interposing.) Let him answer.

Go ahead, Mr. Brown.

By Mr. STEFFEN.

Q. Complete your answer, Mr. Brown.

A. (Continuing.) —To the question of validity, and that was something that I didn't contact with our patent attorneys.

Q. That is, you would say you were not thoroughly familiar with the matter referred to in that paragraph?

A. That is right, except that it was questioned by some of our people.

Q. Did you have anything to do with negotiating a license agreement with USG concerning perforated lath?

A. Yes, sir, I think I did.

Q. Who did you talk with, if anyone, from USG?

A. I don't remember, but those things usually were discussed with Mr. Henning, Mr. Knode, or Mr. Avery.

Q. Did your company finally take out a perforated lath license agreement, do you know?

A. Yes, it is my memory that they did.

Mr. STEFFEN. Your Honor, we offer in evidence Government's Exhibit 267 as being circumstantially identified, not only in the respect that Mr. Van Hagan is a member of the company and Mr. Rahr is a vice president, but it has the Item No. on it, and it is taken from the files of Certain-  
teed.

May I ask one more question?

By Mr. STEFFEN.

Q. Are you familiar with this memorandum at all, Mr. Brown?

A. I don't remember it.

Q. Do you recall ever having seen it?

A. No, sir.

1989 Q. Are you familiar with the subject matter generally?

A. Not as to much of it; but where I am referred to here, that is about the only thing that I am familiar with. It is largely on production.

Mr. STEFFEN. We offer it simply as being circumstantially identified, and hope Mr. Adams can make his objections in a formal and brief manner, to save time.

Mr. ADAMS. I object to it on the ground that no foundation has been made.

Justice STEPHENS. You needn't argue it, Mr. Adams. The Court thinks this is across the line. Objection sustained. There is no identification of this.

By Mr. STEFFEN.

Q. Now I would like to show you Government's Exhibit No. 268, which purports to be a communication from Van Hagan to Mr. C. O. Brown, under date of December 26, 1934, and I ask you to examine that.

Have you finished reading Exhibit No. 268, Mr. Brown?

A. Yes, sir.

Q. That is on the usual form, is it?

A. Yes, sir.

Q. And it is addressed to you?

A. Yes, sir.

Q. Do you recall having seen it?

A. I think I saw it.

1990 Q. You are familiar with the matters discussed in the memorandum?



A. In a general way, yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 268 in evidence.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 268, was received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 269, which purports to be a letter from Mr. Rahr addressed to Mr. H. Dorsey Spencer, under date of October 28, 1935, to which is attached a draft copy of a proposed letter under date of October 28, 1935, to Mr. Morton Knode; and attached further is a letter of Mr. Spencer, a purported letter to Mr. Spencer, addressed to Mr. Chester E. Rahr under date of November 1, 1935.

I ask you merely if you recognize Mr. Rahr's signature?

A. Yes, sir, I recognize his signature.

Q. Do you recall ever having seen the letter?

A. No, sir, I never saw the letter.

1991 Mr. STEFFEN. I now offer Government's Exhibit 269 in evidence. I point out to your Honor —

Justice STEPHENS (interposing). Does that include —

Mr. STEFFEN (interposing). Including the two attachments.

Justice STEPHENS. The two attached copies?

Mr. STEFFEN. Yes. There is a copy of a letter, plus a letter, or rather a copy of a letter, addressed to Mr. Rahr, referring to the proposed draft letter.

Justice STEPHENS. That is dated November 1, 1935?

Mr. STEFFEN. Correct.

Justice STEPHENS. Let the Court examine these a little more carefully, Mr. Steffen, please.

Mr. STEFFEN. All right.

Justice STEPHENS. Who was Mr. Rahr, Mr. Brown?

The WITNESS. Vice president.

Justice STEPHENS. Of Certain-teed?

The WITNESS. Yes.

Justice STEPHENS. And who was H. Dorsey Spencer, if you know?

The WITNESS. I think he was a patent counsel.

Justice STEPHENS. Now what is your statement con-

cerning identification, Mr. Steffen?

Mr. STEFFEN. The first letter has been identified positively as Mr. Rahr's letter. Attached to it is a copy of a proposed letter addressed to Mr. Knode.

1992 Justice STEPHENS. Is that referred to in the letter of October 28, 1935?

Mr. STEFFEN. That is referred to in the letter of October 28, 1935.

Justice STEPHENS. Yes, I see it.

Mr. STEFFEN. And if you will read the attached letter, you will see that it refers specifically to the matter mentioned in the letter of October 28.

Justice STEPHENS. What about the last one?

Mr. STEFFEN. The last letter states in the first paragraph, "Referring to your proposed letter to Mr. Knode", which is the attached copy, attached to the October 28 letter, "which accompanied your letter of October 28"—which has been identified, "I think the letter" and so on is in proper form. There is a straight internal connection between that opening paragraph and Mr. Rahr's letter to Mr. Spencer, it is a direct reply, in other words, and it is identified circumstantially by the subject-matter discussed in Mr. Spencer's letter.

Then I want to make the further point that these were all taken from the files of the Certain-teed Products Corporation, and you will note that the item number —

Mr. ADAMS (interposing). We do not raise any question about that.

Mr. STEFFEN (continuing). Which was put on each of the three is identical, A-e-48.

1993 Justice STEPHENS. Is there any objection to the identification.

Mr. ADAMS. Yes, with respect to the letter of November 1, which I just examined, and see that it is only a copy. It is not signed by anybody, and we have no way of knowing whether the original which was delivered, we can assume, or if we assume it was delivered to Mr. Rahr, was the same as the copy, and there is no evidence with respect to that letter whatever as to what it is.

Justice STEPHENS. What is this handwriting on the left-hand side of the November 1 letter, if you know, Mr. Brown?

The WITNESS. I cannot identify it, your Honor.

By Mr. STEFFEN.

Q. Do you have in mind what the Court asked? It is on

the November 1 letter, Mr. Brown.

A. This handwriting here?

Q. Yes.

A. That is right.

Justice STEPHENS. It says, "license since taken by C.P."

Mr. STEFFEN. Meaning Certain-teed Products.

Justice STEPHENS. Where is the original of this letter, does anybody know?

Mr. STEFFEN. Your Honor, we subpoenaed all the papers from the Certain-teed Products Corporation, 1994 and if they had the original it should have been turned over to us. What they turned over to us was what they were keeping in their files, which was this letter of Mr. Rahr's, and attached to it a proposed letter to Mr. Knode, and attached to that this letter addressed to Mr. Rahr in reply to his letter of October 28, 1935.

Justice STEPHENS. Was it physically attached when supplied to you?

Mr. STEFFEN. Yes, and the proof that they were kept together in the files of the Certain-teed Products Corporation is the item number, A-e-48. They all came in one bunch when we received them.

Mr. ADAMS. I don't raise any question on that point.

Justice STEPHENS. There is a question being raised, as I understand it, about identification of the letter of November 1, but we think the exhibits are identified circumstantially and by reference to each other, and by identification of the signature of Mr. Rahr of the first letter. But the best evidence rule is raised that this letter, the letter of November 1, 1935, is obviously a copy and the original not being produced and not available, it must be shown that the secondary evidence is correct. Is there any way of showing that it is correct? There is no evidence that it is correct.

Mr. STEFFEN. Well, I need merely to account for the lack of the original, and the original simply was not 1995 presented upon subpoena. There is no other way for the Government to get it other than to subpoena it, and it was not furnished on subpoena.

Mr. ADAMS. Both Mr. Rahr and Mr. Spencer are alive and in New York today.

Mr. STEFFEN. That is utterly immaterial with respect to this item.

Justice STEPHENS. It is not immaterial with respect to the matter of correctness.

There are two different objections here. One is lack of identification. We think an objection on that ground would not be well taken. We think they have been identified. But whether they are identified, and whether they are correct, are two different things.

The best-evidence rule goes to the correctness of the letter, and that is the second objection invoked, and that is invoked only with respect to the letter to Mr. Chester E. Rahr, apparently sent by someone whose initials are HDS.

The correctness of it as a copy is now questioned under the best-evidence rule, and that rule is well settled that where you account for the absence of the original, you may introduce a copy, but you must show that the copy is correct.

Mr. STEFFEN. We have accounted for the absence of the original, I presume.

1996 Justice STEPHENS. Yes, surely.

Mr. STEFFEN. Now the evidence to indicate that it is correct is purely circumstantial, and it comes solely from the fact that it was taken from the files of the company and held by the company all of these years as a copy which had reference to Rahr's letter to Spencer of October 28.

Justice STEPHENS. It seems to the Court that that is perfectly equivocal as to whether it is correct. The company might hold an incorrect letter in its files and not know that it was incorrect.

Mr. STEFFEN. Let me make one short statement on that.

As I pointed out before, we are endeavoring to show that these defendants had a certain state of mind, a certain purpose and a certain intent when they went into what we allege to be the conspiracy. It wouldn't, for that purpose, make any difference as to who wrote this letter. The best-evidence rule is not in point, as I see it, as respects showing what these defendants had in mind. If they had kept a copy of a letter written by Mr. X, and they had it attached to this document, and they were informed of the matters appearing in that letter, regardless of whether Mr. X wrote it or not, it would be matter which they had in their files and about which we can assume they knew, and upon which we will ask your Honor to rule at a later date that they acted.

Justice STEPHENS. Mr. Steffen, you have now shifted your argument —

1997 Mr. STEFFEN (interposing). I will grant that.



Justice STEPHENS. We were discussing first whether or not it was within the best-evidence rule, and correct, and you argued that it is correct because it was in their files. Now as I understand it, you have changed and now you argue that whether it is correct or not, is relevant on the theory that they have possession of an incriminating document, so to speak.

Now that goes to the question of relevancy, not to the question of correctness.

What is the relevancy of the letter under the issues?

Mr. STEFFEN. The relevancy of the letter under the issues is to show what the Certain-teed Products Company understood concerning the patent situation at the time when they negotiated a patent license agreement under the perforated lath patent.

We have alleged in the complaint—I think the paragraph is 119, but I will have to check that paragraph—that the defendant Certain-teed Products Corporation was advised of the fact that patent 1,938,354, which is the Roos perforated lath patent, was invalid, and that notwithstanding that advice they proceeded to take out a license for business or other reasons.

Now it is very material, quite apart from the question of whether the patent is or is not invalid, it is  
1998 very material to determine whether they had that information at the time that they negotiated the perforated lath license. We find in their possession what purports to be a letter from Mr. Spencer who was a patent counsel. Mr. Spencer tells them that the patent looks invalid, in fact he is very positive on that. We will show that, nevertheless, they proceeded to take out a license under that patent. Now that, we contend, is extremely relevant to the complaint. It shows the state of mind and the purposes of the defendant to take out a license irrespective of validity.

Mr. ADAMS. Well now, I must confess I am a little confused here —

Justice STEPHENS (interposing). We will have to take our usual noon recess at this time.

(Thereupon, at 12:22 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

1999

## AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m.)

Justice STEPHENS. Mr. Adams, the Court will hear briefly from you, first, and will preface your statement by a question which may shorten the argument.

The Court is somewhat confused, and perhaps counsel have been confused by the Government's contentions, because the Government first argued, as we understood the Government, that after the question of identification had been passed, that this was circumstantially shown to be correct, and therefore the Government, we assume, felt bound to prove it was correct.

The Government also argued, as we understood it, that the best-evidence rule did not apply because this was not being relied upon as an operative document. But what the Court thinks the Government's argument really amounts to, when the whole of it is considered, is an argument that this really is an operative document, and therefore is not within the best-evidence rule, that it comes within the familiar statement of the rule in *Wigmore*, in respect to what are originals and what are copies, so far as the best-evidence rule is concerned:

"The production required is the production of the document whose contents are to be proved in the state of the issues".

The familiar illustration is, for example, in the law of libel. Suppose a person writes out a libelous paper in an original and a copy, and locks up the original in his desk, and publishes the copy. The copy would be introduced in evidence without the introduction of the original because the copy is the document the contents of which are to be proved in the state of the issues.

Now laying questions of identification aside—and they have been passed—the Government here offers this proposed letter of November 1 as a letter taken from the files of the Certain-teed Products Corporation, connected circumstantially with letters concerning patents, and apparently written in response to a letter to a lawyer containing comments which indicate a possible invalidity of a patent which was later, so it is asserted, used by the defendants.

Now we think there is considerable merit to the contention that that document is admissible in evidence. It is introduced as showing some knowledge on the part of the defendant Certain-teed, that there was some doubt about the validity of this patent. What weight it may be entitled to is another question. But it seems to us that the Government is entitled to prove under the issues, although the ques-

tion of the actual validity of the patent is out of the case, that the defendants doubted its validity, because that would tend to prove that they were using them as a cloak. Is that your contention, Mr. Steffen?

Mr. STEFFEN. Yes, it is our contention, your Honor, and much better stated than I did.

2001 Mr. ADAMS. I would like, if I may, to pass that question for the moment.

In stating these objections we got off into another field of discussion, and I did not have an opportunity to state my full objection.

Justice STEPHENS. You may do that now.

Mr. ADAMS. I object to the introduction of these three documents, all three of them, on the ground that they are confidential communications between attorney and client.

Justice STEPHENS. That is another question. We will come to that, now that it has been raised. But let's dispose of these other questions first.

I state the Court's reaction, not to indicate that it is final, but because we want to give you the benefit of an opportunity to answer any questions which come to our mind.

Mr. ADAMS. It seems to me that there has been no showing, even though I might for the purposes of this argument agree that the Government is entitled to show our state of mind with respect to this patent, and I take it that that is what they are trying to do by offering this document, but it doesn't seem to me that that dispenses with the necessity for the Government proving that the document is an authentic document, and it does not seem to me to dispense with the necessity of compliance with the best-evidence rule.

The position that we find ourselves in is that here is a letter—I am referring to the letter of November 2002 ber 1, 1935—which is only a copy, it isn't even signed by the lawyer who the Government says wrote it. It doesn't seem to me that we should be charged with possessing a state of mind because somebody produces a letter which may or may not have been written by our lawyer.

I don't think that you can get around the best-evidence rule by simply saying that you are offering it for a substantive purpose.

Justice STEPHENS. What about the confidential aspect of it?

Mr. ADAMS. As far as it being a confidential communication is concerned, there is no doubt whatever, from the testimony here and the statements of Government counsel

as well as the witness, that Messrs. Newell, Spencer & Safford were counsel for the Certain-teed Products Corporation at that time, and Mr. H. Dorsey Spencer—perhaps I might ask a question of the witness at this point, if I may.

Justice STEPHENS. Yes.

Mr. ADAMS. You recall that law firm, don't you, Mr. Brown?

The WITNESS. Yes, sir.

Mr. ADAMS. And they were your advisers in patent matters, is not that correct?

The WITNESS. Yes, sir.

Mr. ADAMS. Now turning to the letter of October 28, 1935, from Mr. Rahr to Mr. Spencer, a most casual 2003 inspection of that letter, it seems to me, would demonstrate that Mr. Rahr was communicating to his counsel on a matter involving professional advice.

He says in the first place, referring specifically to the beginning of the second paragraph, "I talked with Mr. Morton Knode of the U. S. Gypsum Company and found him considerably annoyed because we had approached the infringement", and so on. That is a legal matter. There are other questions in there.

Then he submits to his lawyer a draft of a letter which he proposes to write. I don't know anything which could be more directly connected with the relations between lawyer and client than to have the client draft a letter and then call upon his legal adviser and ask him if the draft of the letter which he proposed to send out to the world, and publish, is a proper document, obviously soliciting legal advice.

And if we assume, which I do not admit, that the letter of November 1 is identified, we find that the lawyer has considered it, considered the questions submitted to him by his client, and replies, he does not reply as a businessman or as an accountant or as a friend, he replies as a lawyer, telling his client what he thinks he ought to do under the circumstances.

And specifically in the third paragraph he gives legal advice as to his opinion with respect to an extremely important legal matter. I cannot think of anything that could be more definitely within the privilege.

2004 Justice STEPHENS. What do you say on the question of its being confidential, Mr. Steffen?

Mr. STEFFEN. We say, your Honor, that the privilege has been waived and in the Certain-teed Products Corporation's answer, paragraph 119, they state that Certain-teed:



"Denies each and all the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention", and so on.

That is a complete waiver, as we see it, of any privilege in this matter.

Justice STEPHENS. That is Certain-teed's answer to which paragraph of the complaint?

Mr. STEFFEN. To paragraph 119 of the complaint.

Justice STEPHENS. Does paragraph 119 go only to the perforated lath?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. What do you say to that, Mr. Adams?

Mr. ADAMS. I say this, that it seems to me inconceivable that a statement in a pleading could constitute a waiver of a privilege. The cases are perfectly clear on this question of waiver of privilege, that the precise question  
2005 of the waiver of the privilege must be before the client; that the client must take some affirmative action which constitutes a waiver of the privilege.

Now the statement in here that we were advised by patent counsel with respect to a matter alleged in the complaint, is merely our answer to the complaint, and does not in any sense, in our submission, constitute a waiver by us of the privilege, and if it is a waiver of the privilege, it certainly could, by no stretch of the imagination, be anything more than a waiver of the privilege to the extent of what we said about it in the answer.

But I do not see how it can be logically argued that this constitutes a waiver of the privilege with respect to our relations with our patent counsel under any and all circumstances.

It certainly was not intended to be so, and I state that because that is a very important consideration to a court in determining whether or not it is going to preserve inviolate this most important relationship between citizens and their counsel.

Justice STEPHENS. The point that puzzles me about your argument, Mr. Adams, is this.

It is perfectly elementary that the disclosure of confidential matter to a third party is a waiver and destroys the privilege. Now this answer seems to disclose

2006 that with respect to this very patent there was advice from counsel that it might be invalid. That is the very information contained in this letter, or statement contained in this letter in substance and effect. Unless there is some rule of law that the necessity of answering a complaint in an answer, and stating the facts, excepts it from the doctrine of waiver, it is difficult for me to see how you can escape it.

Do you know of any such rule?

Mr. ADAMS. No, I don't know of any such rule, your Honor, except this, that I do know that a defendant in answering a complaint may, under the rules, take as many alternative positions as he desires. He may deny the allegations of the complaint; he may allege as many inconsistent affirmative defenses as he may see fit; and then, upon the trial, he may elect to take whichever position will best sustain his case.

And as I look at this pleading, it seems to me that that is what was being done here.

Justice STEPHENS. Unless counsel for Certain-teed can show to the Court some authority that an admission in the pleadings of the receipt of legal advice to a certain effect, stated in the pleading, does not constitute a disclosure such as would be a waiver, the Court is of the view that it is a waiver.

Mr. ADAMS. I don't think I quite understand the Court. I think perhaps I might ask you to either  
2007 restate it, if you will, or permit it to be read.

Justice STEPHENS. The Court's understanding of the privileged communications rule is that a communication ceases to be privileged if the asserted confidential contents thereof are disclosed to any third person.

Now this admission in the answer to paragraph 119, does disclose to many third persons, to the Court, to adverse counsel, and to anybody who may wish to read these pleadings, which are a public record, that advice had been received from counsel that the perforated lath patent was invalid, or might be invalid.

Unless there is some authority which you can call to our attention to the effect that a statement of disclosure of confidential material in a pleading is not within the rule that disclosure to a third party constitutes waiver, it would seem to us to be a clear waiver.

The point is a novel and unusual one, and we do not pretend to be infallible on the subject. If you regard it as seri-

ous, and wish to present authorities, we will defer ruling.

Mr. ADAMS. We regard it as very serious, and may I say that in your Honor's very statement of your views in the past, you have disclosed what I refer to, very respectfully, as an inconsistency.

What we are dealing with here is a communication between lawyer and client. Now your Honor has said 2008 that if you disclose that communication from the lawyer to the client, you waive whatever privilege you may have —

Justice STEPHENS (interposing). Suppose, Mr. Adams, to make the Court's doubts as to the validity of your position clear, suppose that after a client receives a letter from a lawyer containing concededly confidential advice, he goes out and tells John Doe that he just received that advice, specifying it—is it any longer confidential?

Mr. ADAMS. Certainly not, but it is, in the very language that your Honor uses when you say that he just received that advice specified.

Justice STEPHENS. Well, let's eliminate the word "just".

Mr. ADAMS. No, "specified" is the word upon which I am relying in your Honor's statement. The question is whether or not, with respect to any given communication, whether or not with respect to that given or specific communication, there has been a waiver. Now there has not been any waiver under any possible construction of this pleading, of any communication, any given communication, including this one that is now before the Court, by this company.

Justice STEPHENS. On that question I think your contention does not convict the Court of inconsistency, although the Court does not claim to be infallible with respect to consistency.

2009 But here we have a letter with respect to this particular patent, and paragraph 119 of the complaint relates to the same patent, the perforated lath patent, and the answer relates to the same one. That seems to us to indicate that the admission has to do with this communication.

Mr. ADAMS. If I may point out to your Honor —

Justice STEPHENS (interposing). That is a matter perhaps of probability.

Mr. ADAMS. That is one of the points which I was interested in making.

And secondly, you see that what the answer says is not

what the letter says. Now maybe the answer did waive something, but it did not waive the statements contained in this letter.

Now may I read this, your Honor? It states as follows:

"119. Denies each and all of the allegations of paragraph 119 of said complaint, except that this defendant admits that it was advised by patent counsel prior to the execution of said license agreement with U.S.G. that, in the opinion of such patent counsel, the claims embraced within said perforated lath patent did not rise to the dignity of an invention; but avers (and this is where I wish to interrupt myself to say that this is alleging an affirmative defense and that the statement that I have just made is part of the affirmative defense) that at the same time

2010 said patent counsel advised this defendant that said patent was presumptively valid and that some District Judge might sustain the patent and a Circuit Court of Appeals might affirm such a decision, that the patent had tremendous nuisance value and that it would be very costly for this defendant to attempt to make exactly what is shown in the patent; that, in order to avoid either extended and expensive litigation with U.S.G. with respect to the validity of said patent, which appeared probable in the event that this defendant declined to accept the license agreement tendered by U.S.G., or the expense and delay which would necessarily be involved in the development of a perforated lath possessing the desirable characteristics covered by said patent but avoiding the claim thereof, and because of the fact that U.S.G., by virtue of the provisions of the basic license agreement referred to in paragraph 85 of said complaint, was authorized to determine and fix the minimum selling prices and terms and conditions of sale for all perforated lath manufactured and sold by this defendant, this defendant, in good faith and in the exercise of its sound business judgment, entered into said license agreement with U.S.G. covering perforated lath manufactured in accordance with said perforated lath patent".

Now that seems to me, your Honor, to be an allegation of an affirmative defense, and it is not in any sense a waiver which could possibly be deemed to embrace the statements which are made in this letter of Mr. H. Dorsey Spencer.

2011 Justice GARRETT. Well, every argument that you make, based upon the latter part of that, you can make if this letter is admitted, can you not?

Mr. ADAMS. No, your Honor, I would not say that I



can, because this letter is not in accordance with the facts alleged in the affirmative defense. You see the statements contained in the letter have absolutely no relation to the facts stated in the affirmative defense.

Justice STEPHENS. What page of your answer is that on?

Mr. ADAMS. Pages 46 and 47, sir.

Justice STEPHENS. Now let's see paragraph 119 of the complaint.

Mr. ADAMS. That is at pages 30 and 31, sir.

Justice STEPHENS. Do you wish to be heard any further?

Mr. ADAMS. I should simply like to perhaps sum up my statement that on further consideration it seems perfectly clear to me that the admission here, read with reference to the proposed exhibit, demonstrates very clearly that the admission has no relation to the proposed exhibit.

Justice STEPHENS. Well, I am sorry, Mr. Adams, but we have a different view. We think that the admission is sufficiently specific to identify disclosure of the information contained in this letter. Perhaps other information was also disclosed in other communications, but the rules with respect to the client's waiver, or the waiver 2012 of the client's lawyer, are pretty well settled. I refer you to Wigmore's Hand Book, Third Edition, 1942, Sections 2464 to 2471. That has to do with testimony as distinguished from admissions, but there can be no difference in effect.

It is true that the particular communication which is alleged to be confidential must be waived, but the question is whether or not the admission in this answer isn't sufficiently a waiver of that communication, that is of the subject-matter contained therein, the advice contained therein. We think that it is. The exhibit is received in evidence.

Mr. ADAMS. Does your Honor rule also that the exhibit is identified as a letter of Mr. Dorsey Spencer's?

Justice STEPHENS. We have already ruled on that.

Mr. BROMLEY. May we make the usual objection?

Justice STEPHENS. Yes, it is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibit No. 269 were received in evidence.)

Mr. STEFFEN. I might call your Honor's attention, if you would like, to the very appropriate case of Tutson v. Holland, 50 Fed. (2d) 338, where Mr. Justice Groner

speaks on this general subject.

2013 Justice STEPHENS. Thank you.

Have you much more examination of this witness?

Mr. STEFFEN. I don't think so, your Honor.

Justice STEPHENS. I hope we can move forward rapidly. There are several other witnesses waiting.

Mr. STEFFEN. Yes, they are. I would like to introduce one further exhibit.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 270, which purports to be a memorandum dictated by Mr. Rahr for the attention of Mr. S. C. Straub, under date of November 15, 1935, and ask if you can identify it. Have you examined Exhibit 270?

A. Yes, sir.

Q. Can you identify the initials on the left-hand side?

A. A. Whittemore's; my own initials; and S. C. Straub's initials.

Q. This is the usual form of inter-office memorandum?

A. Yes, sir.

Mr. STEFFEN. We offer Government's Exhibit No. 270.

Mr. BROMLEY. We have never seen it, if the Court please.

Justice STEPHENS. Let counsel inspect it.

Mr. STEFFEN. Surely.

(Proposed Government's Exhibit No. 270 was handed to defendants' counsel.)

Justice STEPHENS. That is in this bound volume, the next to the last document.

2014 Mr. BROMLEY. We got a loose set, and it was not contained in that.

Justice STEPHENS. Very well.

Who is Mr. C. S. Straub, Mr. Witness?

The WITNESS. He was a production man, assistant to Mr. Whittemore.

Justice STEPHENS. In Certain-teed?

The WITNESS. Yes, sir.

Mr. BROMLEY. In addition to the usual objection we object to it as immaterial.

Justice STEPHENS. The Court does not see offhand what its relevance is, Mr. Steffen. It seems quite ambiguous. Maybe it can be connected with something else. What is your contention with respect to its relevancy and materiality?

Mr. STEFFEN. It will have to be connected, I think, with

some additional testimony, your Honor, concerning what is meant by the second paragraph.

Justice STEPHENS. The exhibit is received in evidence subject to the usual reservation with reference to the declarations of alleged co-conspirators. It has been identified sufficiently, but it is received subject to connection. The right to move to strike may be reserved.

(The document marked as Government's Exhibit No. 270 was received in evidence.)

2015 Mr. BROMLEY. I should like to say, if I may for the record, that it seems to me that the fact is that Exhibit 269, the letter of October 28, 1935, and the draft of the letter of the same date, the latter referring to the two firms of attorneys mentioned in Exhibit 270, indicate that all three of these documents have to do with Super Tomastone plaster, which is mentioned in the first line of the letter of October 28, 1935, and that this memorandum, Exhibit 270, probably has to do with the same thing. If that is so, that is the foundation for my objection as to materiality. I think it has nothing to do with any part of this dispute.

Justice STEPHENS. Well, if that appears, you may move to strike.

Mr. BROMLEY. Yes, sir.

By Mr. STEFFEN.

Q. Can you tell us what this Exhibit 270 refers to, Mr. Brown?

A. No, sir, I really don't know.

Q. You identified your initials on the side?

A. Yes, sir.

Q. Did it have to do with Super Tomastone plaster?

Justice STEPHENS. If you know.

The WITNESS. No, sir, I don't recall.

By Mr. STEFFEN.

Q. Do you know what is meant in the second paragraph by, "what is good, practical business for the  
2016 industry"?

A. No, sir.

Mr. STEFFEN. We will withdraw the exhibit, your Honor.

Justice STEPHENS. It may be withdrawn.

(Government's Exhibit No. 270, previously received in evidence, was withdrawn.)

Mr. STEFFEN. Your Honor, we have a series of exhibits

which we would like to have identified, as I started to do yesterday, which we will make as our offer of proof in connection with the matter we discussed yesterday.

Justice STEPHENS. They may be identified.

Mr. STEFFEN. If we can have them numbered, and then identified by this witness, it will save time.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Now, I show you, then, Government's Exhibit 271, which purports to be a letter from Warren Henley, addressed to Charles F. Henning, under date of August 25, 1931; I show you Government's Exhibit No. 272, which purports to be a letter from Mr. Knode, addressed to Certain-teed Products Company under date of August 18, 1932; also Government's Exhibit No. 273, which purports to be a letter from Mr. Knode, under date of August 26, 1932, addressed to Certain-teed Products Corporation; also

Exhibit 274, which purports to be a contract between 2017 United States Gypsum Company and Certain-teed under date of May 7, 1930 —

Justice STEPHENS (interposing). Have we seen these?

Mr. STEFFEN. Yes, they are in your folders at one place or another.

Justice JACKSON. Except this first one that has just been handed to us.

Mr. STEFFEN. That is the only one that is not in the folders.

Justice GARRATT. Where is Exhibit 272 in this bound volume?

Justice STEPHENS. We haven't ever had any 272 before. We may have seen the document but it has a new number now, hasn't it?

Justice JACKSON. These that you are offering now were never tendered under any other number, were they?

Mr. STEFFEN. No, I am just now tendering them by number.

Justice STEPHENS. Then these are not documents that we had before the witness the other day when the ruling was made?

Mr. STEFFEN. No, your Honor, we had opened with one or two of these documents, and these are the remaining documents in that sequence.

Justice GARRETT. Just a moment, until I can identify this Exhibit 272. I suppose this is it. You say it is an agreement made the —



Mr. STEFFEN (interposing). If I may, what I would like to do, your Honor, is to number them, hand  
2018 them to the witness, and he can take them one by one and we can have them identified that way, and you can look at them at the same time.

Justice STEPHENS. Very well.

Mr. STEFFEN. I now show you Government's Exhibit No. 275, which purports to be a contract between Certain-teed Products Corporation and the United States Gypsum Company, under date of October 28, 1930.

I also show you Government's Exhibit No. 276, which purports to be another contract between the U. S. Gypsum Company and Certain-teed Products Corporation, under date of September 1, 1932, to which is attached an assignment under date of July 14, 1933.

I also show you Government's Exhibit No. 277, which purports to be an agreement between United States Gypsum Company and Certain-teed Products Corporation under date of January 15, 1936.

Now if you will examine those exhibits, starting with Exhibit No. 271, which is the Warren Henley letter addressed to United States Gypsum Company, under date of August 25, 1931, and tell us whether you can identify Mr. Henley's signature?

The WITNESS. That is Mr. Henley's signature.

By Mr. STEFFEN.

Q. Will you lay that letter to one side and take up  
2019 Exhibit No. 272?

A. Yes, sir.

Q. Are you able to identify the signature at the foot of that letter?

A. It is Mr. Knode's.

Q. Can you identify the initials and the writing on the left-hand margin?

A. Yes, sir, A. Whittemore's. The writing is in my own handwriting, and signed with my initials.

Justice STEPHENS. I didn't hear the witness' testimony as to whether he could identify the signature, yes or no.

The WITNESS. Yes, sir, it is Mr. Knode's.

By Mr. STEFFEN.

Q. Will you take up Government's Exhibit No. 273 —

Mr. ADAMS (interposing). If your Honor please, as far as I am concerned, I am willing to waive identification of these documents and save time in that way.

Mr. BROMLEY. I agree.

Justice STEPHENS. If that may be stipulated with respect to each of these exhibits marked, it will save a great deal of time.

Mr. ADAMS. Yes, sir.

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. Thank you, Mr. Adams.

Mr. STEFFEN. Your Honor, I noticed this morning as I reread the transcript, that we were to make our 2020 offer of proof in writing —

Justice STEPHENS (interposing). You may if you wish, you are not required to do so.

Mr. STEFFEN. I intended to do it orally.

Justice STEPHENS. You may make it orally if you wish.

Mr. STEFFEN. If I could have a couple of minutes —

Justice STEPHENS (interposing). Of course, before we rule on so many complicated exhibits, we would want to look at them ourselves, and we may have to take a recess of a few minutes.

Mr. STEFFEN. Would it be more agreeable if I made the offer tomorrow morning?

Justice STEPHENS. That would be entirely agreeable to the Court.

Mr. ADAMS. It is certainly agreeable to us to do that tomorrow morning, and I trust that it will not be necessary to have the witness here. He is extremely anxious to leave here today if possible.

Justice STEPHENS. He is still subject to cross-examination.

Mr. ADAMS. Yes, but assuming we get through with his cross-examination —

Justice STEPHENS (interposing). He will be released as soon as he can be.

Mr. ADAMS. Thank you.

2021 Mr. STEFFEN. We would like to introduce at this time Government's Exhibit No. 278 which purports to be a draft copy of a contract being negotiated between the United States Gypsum Company and licensees during the period of June 1929.

Justice STEPHENS. Is that in this group of exhibits?

Mr. STEFFEN. It is stipulated that this was a copy which figured in the negotiations at that time.

Justice STEPHENS. Is there any objection?

Mr. BROMLEY. Exhibit 278 is not in the group on the basis of which you are making an offer of proof, is it?

Mr. STEFFEN. No.

Mr. BROMLEY. Then there is no objection except the usual one to Exhibit 278.

Justice STEPHENS. It may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 278 was received in evidence.)

Justice STEPHENS. Have we that in this file, Mr. Steffen?

Mr. STEFFEN. Yes, sir.

Mr. OLIVER. May I ask if that is an unexecuted contract, something that was just proposed during that time?

Mr. STEFFEN. That is a draft which was discussed at that time.

2022 You need not look at it, Mr. Brown.

Justice STEPHENS. It has been admitted without objection, Mr. Brown, so we won't have to call upon you to identify it.

The WITNESS. Thank you, your Honor.

Mr. STEFFEN. I think that is all the questions we have at the moment, your Honor.

Justice STEPHENS. You may cross-examine, Mr. Bromley.

2023 CROSS-EXAMINATION by Mr. BROMLEY.

Q. George M. Brown was the chief executive officer of Certain-teed at the time of its formation in 1910, was he not?

A. Yes, sir.

Q. And he remained so at least up to the time that you left the company in 1937?

A. Yes, sir.

Q. Isn't it a fact that George M. Brown made all company decisions himself?

A. He was a very major factor.

Q. Wasn't he something of an individualist, Mr. Brown?

A. Yes, sir.

Q. And didn't he make his decisions practically by himself?

A. In the final analysis, I would say yes.

Q. You would not say, would you, that he relied upon your advice in deciding whether or not to take licenses from USG?

A. I don't know how much he would rely on it.

Q. Well, certainly prior to the taking of the first license, which was taken in May, 1929, he did not seek your advice, did he?

A. That is right.

2024 Q. And that likewise is true prior to the taking of the second license in November, 1929, isn't it?

A. I don't remember.

Q. Well, isn't it a fact that you had nothing to do with that decision, Mr. Brown, except to go to Chicago and report what you had heard?

A. That is right.

Q. It is a fact, isn't it, sir, that Mr. George Brown was strongly opposed to having the Certain-teed prices fixed by USG, or anybody else?

A. Yes, sir.

Q. Independence in price policy had been General Brown's policy for many years, had it not?

A. It had.

Q. And hereafter, in my examination, when I want to refer to the President of the company, George M. Brown, I shall call him General Brown, which is his present-day title, isn't that right?

A. His friends all call him that, yes, sir.

Q. In order to differentiate him from you, can we agree that I shall refer to him hereafter as General Brown?

A. Yes, sir.

Justice STEPHENS. Have you a title, Mr. Brown?

The WITNESS. No, sir.

Mr. STEFFEN. Let's make him a colonel. (Laughter.)

By Mr. BROMLEY.

2025 Q. Now as a matter of fact, at all times prior to the time that Certain-teed took the first license, wouldn't you say that it was true that the last thing in the world the General wanted was to have his prices fixed by USG?

A. Yes, sir.

Q. You testified that one of the factors which influenced you in feeling that it was desirable to take the November license was price control. Isn't it a fact, Mr. Brown, that that was your own view, and not the view of Certain-teed?

A. I think my testimony stated that it was my view.

Q. And that is your testimony now?

A. Yes, sir.

Q. The Certain-teed Products Corporation, and General Brown, were both in the industry as a company and an individual that pursued an individual price policy on all products, isn't that right?



A. Yes.

Q. And the Certain-teed Company had a reputation in 1929, and prior thereto, of pursuing independent price policies, did it not?

A. Yes, sir.

Q. Now you were engaged in a sales capacity during practically the entire time that you were with the company, were you not?

2026 Yes, sir.

Q. And you were engaged in a sales capacity from 1914 to 1936, were you not?

A. Yes, sir.

Q. The testimony which you gave the other day, that you had worked for a brief period at the beginning in another capacity, didn't mean that you were ever engaged for any length of time in production, did it?

A. No, sir, not a great length of time.

Q. You had nothing to do with production after 1914, isn't that the fact?

A. No, after 1914 I had nothing to do with production.

Q. And so, from that time on, your entire work concerned sales and sales promotion, did it not?

A. Almost entirely.

Q. Now since that was your primary if not your chief activity, wouldn't you say that it was a fact that you were naturally interested in the prices which the company got for its products?

A. Yes, sir.

Q. It is a fact, isn't it, that prior to 1923 the company had not been in the gypsum industry?

A. That is correct.

Q. Its business was to manufacture and sell roofing and floor-covering materials?

2027 A. And paints and varnishes.

Q. And the sales policy which it had followed prior to 1923 was to charge such prices as would permit the establishment of a large volume, isn't that right?

A. Yes, sir.

Q. After the company entered the gypsum industry in 1923, it pursued the same policy in that industry, did it not?

A. That is correct.

Q. And when I say "entered the gypsum industry in 1923", it was in that year that the company first started to sell gypsum plaster, was it not?

A. Yes, sir.

Q. And thereafter, and in 1926 when it entered the gypsum board business, it still pursued the same policy of obtaining volume by low prices, or independent prices, as it had practiced theretofore in the roofing business; is that right?

A. Yes, sir.

Q. Now with reference to Exhibits 213 to 216, consisting of correspondence in March, 1928, between Certain-teed and Mr. Henning, I show you what purports to be an original letter signed by you, dated April 4, 1928, addressed to United States Gypsum Company—I withdraw that.

2028 Mr. BROMLEY. I ask the Government, in connection with the exhibits which I have mentioned, to produce a letter dated April 7, 1928, from United States Gypsum Company by Mr. Henning, to Certain-teed Products Corporation, Attention Mr. George M. Brown.

Mr. KNUFF. I don't seem to have any letter of April 7, 1928, here. I will look in the office and see if I have it over there.

Mr. BROMLEY. Well, it is the last one in the series of which Exhibits 213 to 216 are four.

Mr. KNUFF. I still say I don't have it here.

Mr. BROMLEY. Would you recognize a photostat of it if I showed it to you?

Mr. KNUFF. I believe I have seen a letter of similar import, although I wouldn't say for certain, and I think I have it over in the office.

Mr. BROMLEY. I would like to have it marked for Identification. May I use the photostatic copy, with the understanding that when you produce the original we can substitute it?

Mr. KNUFF. Yes.

Justice STEPHENS. That may be done.

(The document referred to was marked as Defendants' Exhibit No. 4 for Identification.)

2029

By Mr. BROMLEY.

Q. Does that letter, Defendants' Exhibit 4 for Identification, refresh your recollection, Mr. Brown, so that you can now state that in April, 1928, because of the litigation between the two companies, the USG Company withdrew its offer to grant your company a license?

A. This would indicate so. I don't remember this situation.

Q. Don't you remember now that in 1928, the offer which had theretofore been made to your company by USG was, as a matter of fact, withdrawn?

A. No, sir, I don't remember that.

Mr. BROMLEY. Will you show the witness Exhibits 213 to 216, inclusive, please?

(The exhibits referred to were handed to the witness.)

By Mr. BROMLEY.

Q. Exhibits 214 and 216, being your letters to USG, you told us were written by your attorneys for you to sign and send, didn't you?

A. Yes, sir.

Q. Now at the time of this correspondence, Exhibits 213 to 216, it was a fact, wasn't it —

Mr. STEFFEN (interposing). Your Honor, we don't have a copy of this before us, and we would like to have it for purposes of examination. It was not furnished 2030 to us the night before. (Laughter.)

Justice STEPHENS. Reciprocity must be required. (Laughter.)

Mr. BROMLEY. I didn't furnish it to him last night because they have had it for three years. (Laughter.)

Mr. STEFFEN. That sounds like something I have heard before. (Laughter.)

By Mr. BROMLEY.

Q. It was the fact, wasn't it, Mr. Brown, that at the time of this correspondence, Exhibits 213 to 216, General Brown was exceedingly reluctant to enter into any arrangement which gave anybody else the right to fix his prices?

A. That is correct.

Q. Indeed, wasn't it the General's view that price fixing by somebody else could be used by the licensor to injure the business of Certain-teed by making a price which was too low?

A. I don't know as to that point.

Q. By the way, the fact is, isn't it, that in all of your discussions with him and other officers of the company, and with others in the industry, the only price fixing that you were talking about was price fixing of a patented product manufactured by a licensee under the patent?

A. Yes, sir, that is correct.

Q. Do you recall that in the early part of 1928, 2031 General Brown had determined that the Certain-teed Company could continue successfully in the

gypsum board industry without making a closed-edge board?

A. I think that was his opinion for a time.

Q. That was against your business judgment, wasn't it?

A. Yes, sir.

Q. As of that time, that is, early in 1928, you had convinced yourself that your company, to remain in successful business, needed the closed-edge board; isn't that right?

A. Yes, sir.

Q. And it is a fact, isn't it, that in 1928 your customers were demanding the closed-edge product in preference to the open-edge?

A. Yes, sir.

Q. And isn't it correct to say that you felt there was considerable pressure upon you, from your associates in your sales department, to obtain the right to make the closed-edge product?

A. A great deal of pressure.

Q. That pressure manifested itself in the first instance, within your organization, from your salesmen in the field, did it not?

A. Yes, sir.

Q. And isn't it true that thereafter, and in 1929, General Brown himself became convinced that it was necessary, in order to remain in the gypsum board business successfully, to obtain a license to manufacture closed-edge board?

A. I think that is correct.

Justice STEPHENS. The Court will take the usual afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, gentlemen.

By Mr. BROMLEY.

Q. You told us the other day, I believe, sir, that you did not participate in the Certain-teed decision to take the May license?

A. That is correct.

Q. And that you had nothing to do with the negotiations leading up to the execution of the May license?

A. That is right.

Q. However, prior to May, 1929, you had convinced yourself that Certain-teed needed the closed-edge product, had you not?

A. Yes, sir.



Q. And you also felt, as a matter of business policy, that the then pending litigation between USG and your company should be settled, did you not?

A. Yes, sir.

Q. Now isn't it a fact that you also knew that notwithstanding the fact that the closed-edge patent expired in August, 1929, the other patents covered by the then proposed form of license, which ran until 1937, were likewise necessary to the successful manufacture of the closed-edge product?

A. That was my opinion.

Q. And one of the very important patents in that group contained in the May license was the patent covering the machine which made the closed-edge product, wasn't it?

A. Yes, sir.

Q. That patent did not expire until 1937, did it?

A. That is my memory.

Q. As far as the litigation is concerned, isn't it true, Mr. Brown, that notwithstanding the expiration of the Utzman patent, the litigation involved the question of whether or not Certain-teed would have to assume the Beaver license, and the Beaver license by its terms ran until 1937?

A. I think that is correct.

Q. Would you say that the fact that price control under the May license, as it was proposed, ran only until August, 1929, was or was not a factor in the decision of Mr. George Brown to take the May license?

A. I don't know.

Q. Well, it was a fact that at the time he decided to take the May license under the form of the license as then proposed and as it existed with other companies, price fixing was only to run until August, a matter of  
2034 some 3 months; do you remember that.

A. Yes, sir.

Q. And don't you recall that it was the decision of Mr. George Brown finally to take that license because he felt that no great harm could come from price fixing which lasted only for about 3 months?

A. I think that was his opinion.

Q. The testimony, which you gave the other day, that price control and the question of whether other companies took licenses were factors in connection with the taking of one or the other of the licenses, had relation only to the November 1929, license, didn't it?

A. That is right.

Q. And your testimony in that connection, in which you stated that it was your preference that there be price control, was intended, was it not, to reflect merely your own personal opinion?

A. That is right.

Q. And you did not purport to express in that testimony either the opinion of Mr. George Brown or the opinion of the management of the company as a whole?

A. No, sir.

Q. At page 2049, Mr. Brown, of the transcript, you testified that your reference, on the second page of Exhibit 228, to the phrase "plus other advantages", 2035 meant price control. It is the fact, isn't it, that the price control to which you referred in your testimony was price control only on the patented product to be manufactured by a licensee?

A. That is right.

Q. At the top of page 2056 of the record, reference was made to the bundling license, Exhibit 230; and to the statement about that license in Exhibit 228; and you will recall, I think, that you said, "I would like to correct that. I would say my answer would be the same as to your question, plus other advantages in working under the patent."

Now as a matter of fact, Mr. Brown, at the time you gave that answer, did you realize that there was nothing in the bundling license about price control whatsoever?

A. No, I didn't realize that.

Q. The phrase which counsel for the Government was asking you to explain in Exhibit 228 was the phrase, "in the interest of harmony in the Industry", which appears in Exhibit 228 in the third whole paragraph under the heading "Bundling Patent".

Now isn't it true that that reference, "in the interest of harmony", didn't have anything to do with price fixing or price control at all, but on the other hand was intended by you, when you wrote it, to refer to the fact that the United States Gypsum Company had threatened to sue you, sue your company, for infringement of its bundling 2036 patent?

A. I don't remember about that.

Mr. BROMLEY. Will you show the witness Exhibit 228, please?

(Exhibit 228 handed to the witness.)

By Mr. BROMLEY.

Q. On the first page, Mr. Brown, the second paragraph under the heading, "Bundling Patent"—will you read it, please?

A. Yes, sir.

Q. Doesn't that refresh your recollection that at the time you wrote this memorandum, the fact was that you had been accused by USG of infringing their bundling patent, and that they had the legal papers drawn preparatory to starting an infringement injunction and damage action against you therefor?

A. That is right.

Q. And doesn't this paragraph in Exhibit 228 also refresh your recollection that it was your view that you could avoid the litigation and get out of the damage claim if you took a license and agreed to pay royalties in the future?

A. That is right.

Q. And isn't that what you meant in the next paragraph when you used the phrase, "and, further, in the interest of harmony in the Industry."?

2037 A. I think, on second thought, that must be correct, especially in view of the fact that the license did not have the price control feature in it.

Q. The invention covered by the bundling patent was a valuable one which you thought would yield real advantage to your company, isn't that right?

A. That is correct.

Q. And as a matter of fact, that invention under that patent was used by your company on all of your board from that time until the time that you left the industry, wasn't it?

Mr. STEFFEN. I don't think the witness is qualified to testify whether he has used a particular patent or not. I object to that. That is a question that we are going to go into in considerable detail, as to whether any board was made under these particular patents or whether any board was bundled pursuant to these patents, and it is a matter which will take rather expert testimony.

Justice STEPHENS. Read the question:

(The question was read by the reporter.)

Justice STEPHENS. You are talking about the bundling patent?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. What is your position with respect to the objection?

2038 Mr. BROMLEY. I guess I had better withdraw the question.

By Mr. BROMLEY.

Q. As a matter of fact, you know, don't you, that at all times up to the time you left the industry, lath and board was bundled by this strip of paper along the side in bundles of 5 or 6?

A. In the case of lath, and 2 in the case of board.

Q. And that at all times, up to the time you left the industry, you know that your company paid, for the privilege of bundling lath in that fashion, 10 cents per thousand square feet for every thousand square feet of board sold and bundled?

A. Yes, sir.

Q. At page 2066 of the record, you stated, in effect, with reference to the November, 1929, license, that if all of the companies had not taken the bubble license, Certain-teed might not have taken it. Now did you intend that to be a reference to getting all companies together under licenses having price control?

A. I don't recall that I stated "all companies", but I might have.

Q. Well, I guess I am wrong. I see you said "if a substantial number". I see that the question was "if a substantial number"—so I will change my question. I will withdraw the question.

2039 You testified, in effect, that Certain-teed might not have taken the November license unless a substantial number of the other companies had likewise taken it. Now what did you mean by that testimony, what was the reason that you felt it would not be desirable for your company to take a license unless others took it?

A. Well, the more people in the business manufacturing the same type of board, the better it is, in my opinion.

Q. Well, wouldn't you, Mr. Brown, have thought that if USG offered a license under an invention and nobody was interested except one company, that that might constitute some reflection upon the value of the invention?

A. It would have a lot of bearing.

Q. And isn't that what you intended to state when you gave that testimony about others taking a license?

A. I think it is a fair assumption, yes, sir.

Q. In other words, was it your meaning that if a sub-



stantial number of companies took a license under which they were obligated to pay royalties, that would constitute an indication to you that the invention was a valuable invention and constitute a reason why you should think your company should have it?

A. Certainly. I would feel it was more valuable than if nobody wanted it.

Q. And wasn't that the intent and purpose of your 2040 testimony, in so far as it referred to whether or not other companies took a license?

A. I think that is right.

Q. Now coming down to the period of time after the May, 1929, license, would you say that prior to November, 1929, you had become convinced that the so-called foam or bubble board, like the closed-edge, was a desirable product for which there was a customer demand?

A. Yes, sir.

Q. And did you reach the conclusion, in your own mind, prior to November, 1929, that there was a strong customer demand for foam or bubble, lightweight board?

A. There was.

Q. And were you, as sales manager, anxious to see your company obtain the right to manufacture that board?

A. Yes, sir.

Q. And was it your view that if Certain-teed did not get that right, they would be in the same position of competitive disadvantage which they had been in when they were selling open-edge against competitors' closed-edge board?

A. That is right.

Q. And is that why you concluded that it would be a desirable and advantageous matter, from a business standpoint, to take the November, 1929, foam, starch license?

A. Yes, sir.

2041 Q. I refer you to Exhibit 228 again, which you have before you, and particularly to the second sentence of that memorandum, and ask you whether or not what you have just stated isn't what you meant by the use of the phrase, "For the following business reasons, however, \* \* \* it was decided to take a License \* \* \*"?

A. What page is that on?

Q. The first page, the first paragraph?

A. Yes, sir, that is right.

Q. I direct your attention to the handwritten note at the top. Will you read it to me, please?

A. "O.K. to sign up—GMB".

Q. Is that in the handwriting of Mr. George M. Brown?

A. Yes, sir.

Q. And does that indicate to you, sir, that on or about July 3, 1929, Mr. George Brown, the President of your company, had decided that the company should take the November license?

A. That is right.

Q. And is that the written record of his decision to which you have just referred?

A. It is.

Q. And isn't it the fact, sir, that so far as this memorandum is concerned, Exhibit 228, prepared by you, the main reason, in your mind, why the company should take the November license, is set forth in the last paragraph on the first page of the exhibit?

A. That is right.

Q. Certain-teed had made its own investigation of the question of whether the process resulted in a cost saving, had it not?

A. I think it had.

Q. Your Mr. Van Hagan had conferred with USG's Mr. Knobe, the latter being in charge of production for USG, and informed himself of the merits of the invention and the economies resulting from its use; isn't that right?

A. Yes, sir.

Q. And isn't it the fact that the fourth sentence in the last paragraph on page 1, beginning "Any known methods for getting this result", was intended by you to express your view that you didn't feel Certain-teed should be put in a non-competitive situation again, as had been the case with respect to your manufacture of open-edge board when others were making the patented, closed-edge board?

A. That was my desire.

Q. Turning over the page and referring once more to the first paragraph on the second page, "Taking these things into consideration, plus other advantages in working under the patent, we feel justified in taking a license", and so forth—didn't you intend by the phrase "plus other advantages in working under the patent", to mean not only the price control in which you were personally interested, but the elimination of litigation then existent between your two companies?

A. "Litigation" meaning on the bundling, I take it?

Q. Yes, I should have said threatened litigation and the possibility of litigation if you did not take a license.

A. There was no threatened litigation on the bubble, as I remember.

Q. No, sir. But there was threatened litigation on the starch patent, wasn't there?

A. I could have had that in mind. I really don't remember.

Q. And didn't you also feel that it would make a better market in general for a number of companies under license to be behind the production of a superior patented product?

A. Yes, sir.

Q. And wasn't that one of the matters to which you intended to refer by your use of the phrase, "plus other advantages in working under the patent"?

A. I don't remember as to that, sir.

Q. Will you look, please, at Exhibit 234, which is your memorandum to Mr. Whittemore of October 3, 1929, and will you please tell the Court, Mr. Brown, what you meant by that last sentence in the second paragraph, "We 2044 are all using enough Starch to say we are making Board under the Universal Patent."?

A. Well, it was sometime during 1929 when I first heard of the Haggerty starch patent, and on investigating the matter with our production men I found we were using starch, and that you couldn't make a satisfactory board without doing so; and at the same time, apparently we were infringing that patent.

Mr. STEFFEN. I would object to the statement as to whether they were infringing, Your Honor, on the ground that it calls for a conclusion. I don't think the witness is qualified to testify that they were infringing the Haggerty patent.

The WITNESS. I said "apparently".

Justice STEPHENS. Read the answer.

(The answer was read by the reporter.)

Justice STEPHENS. The objection is overruled. The question goes to the reasonableness of the witness' testimony as to the meaning of the exhibit.

By Mr. BROMLEY.

Q. Furthermore, hadn't you investigated the situation, and didn't you intend to indicate, by that sentence to which I have referred, that all manufacturers of board were infringing the Haggerty patent, and isn't that what you meant by the phrase, "We are all using . . ."? 2045

A. Well, I assumed they were if we were doing

it and found it necessary.

Q. Weren't you informed, Mr. Brown, that it was impossible to make board and secure a good bond between the core and the paper without the use of starch?

A. That is what our production men claimed.

Q. And weren't you informed that the infringement of which your company had been guilty was of such a character that it was either necessary to pay large damages and go out of business, or take a license in order to continue satisfactory manufacture of board?

A. Well, I don't recall any threats of large damages at that time.

Q. You had been using starch, however, for years, had you not?

A. Yes, sir, since we started making board.

Q. And as a result of the investigation of your production men, you became convinced that you had to continue to use starch if you wanted to make satisfactory board, didn't you?

A. That is right.

Q. In your discussions with officials of Certain-teed early in 1929, at or about the time that your company had decided to settle with the USG and take a license, did you ever hear it suggested by anyone that there was any understanding that USG would find some other patent to continue price control beyond August 6, 1929, the date of the expiration of the Utzman patent?

A. No, sir, I don't recall anything like that.

Q. Did you ever hear of, or have yourself, any understanding that the board license agreement of May, or of November, 1929, would be used to raise or fix prices of plaster or other gypsum products that were not patented?

A. No, sir.

Q. Did you ever, yourself, have any understanding with any competitor, or know of any understanding to which your company or others —

Mr. STEFFEN (interposing). I think, Your Honor, that this is going beyond the direct-examination. We asked nothing at all of this witness in regard to the negotiations which may have looked to a regulation of plaster prices.

Mr. BROMLEY. There is a charge in the complaint; if counsel want to withdraw it I would be glad to go to something else.

Mr. STEFFEN. There is a charge in the complaint, but the witness hasn't been asked any questions on it. This is cross-examination, and under the Federal rules must be



kept within the scope of the direct-examination, irrespective of what appears in the complaint.

2047 Justice STEPHENS. The Court doesn't recollect, Mr. Bromley, any examination of this witness on direct with respect to plaster and other products. Now the testimony has been voluminous, and the Court's memory is by no means infallible. There may be something on that subject. Can you refresh my recollection?

Mr. BROMLEY. What I had in mind was that Mr. Steffen had elicited testimony from this witness—I will withdraw that—Mr. Steffen had put in evidence declarations in the form of memoranda, through this witness, about the meetings in Chicago in connection with the negotiation of these licenses, and I had in mind that the charge was, in the complaint at least, that in those meetings some agreement was reached on price control on unpatented products.

Justice STEPHENS. As to that, Mr. Steffen, the Court does have some recollection that apart from this witness' oral statements, there were some exhibits introduced through him which, as the Court thought when you introduced them, you were relying upon to indicate that other products than board were contemplated as being within the alleged price fixing understandings—is that right or not?

Mr. STEFFEN. That is definitely part of the Government's case, Your Honor.

Justice STEPHENS. Well, yes, but I mean in the exhibits introduced through this witness.

2048 Mr. STEFFEN. I don't recall, really.

Mr. BROMLEY. You had better let me make sure about it, then, if you don't recall.

Mr. STEFFEN. If Mr. Bromley will point out —

Mr. BROMLEY (interposing). I am pretty sure Your Honor's recollection is right, and that is why I made the note to ask him the question.

Justice STEPHENS. Suppose you take time to look into the exhibits a little. We would like to finish with this witness today if we can.

I do recollect that some of the exhibits were examined upon in a line of examination which indicated, as I thought, that Government counsel was contending that they indicated there was some idea of price fixing on products other than board. But whether they were the exhibits identified by this witness or not, I don't pretend to be able to say from recollection.

Mr. BROMLEY. Will you concede that there is no testi-

mony put in through this witness, in documentary form or otherwise, which in any way tend to support your charge that there was any agreement to fix prices on unpatented gypsum products?

Mr. STEFFEN. The answer is no.

Justice STEPHENS. Then you may proceed with the examination. It can not harm —

2049 Justice GARRETT (interposing). I think perhaps Mr. Steffen was misunderstood.

Mr. STEFFEN. My answer was no, we did not concede the point made by Mr. Bromley, that we did not wish to have it understood that there was evidence brought out by this witness of the sort —

Justice STEPHENS (interposing). What I thought Mr. Bromley was asking you—in fact, the Court had thought of asking you—was whether you claimed that any of the exhibits identified and explained by this witness are relied upon by the Government to prove price fixing on products other than board. If you claim that, then of course the defendants have a right to cross-examine on it. If you don't claim it, then that is out of the direct-examination.

Of course, if you have no memory, I am not trying to press you for too sudden an answer.

Mr. STEFFEN. I haven't any memory on that point. I honestly don't recall whether there was an exhibit introduced by this witness. I am sure there is no testimony by this witness. I am also sure that Your Honor is correct that there have been exhibits during the course of the trial which did take up that subject.

The WITNESS. I don't recall any, Your Honor.

Justice STEPHENS. Well, in the interest of time let us suggest this: There is no jury. Examine the witness on that subject, Mr. Bromley, and then by  
2050 tomorrow morning counsel will have had an opportunity to find out whether there are exhibits on which the Government relies, through this witness, for that purpose. If there are, the examination may stand; and if not, it may be stricken. The Court wants to hold the cross-examination fairly within the limits of the direct, in the interests of time if nothing else.

Proceed.

By Mr. BROMLEY.

Q. Isn't it a fact, Mr. Brown, that so far as you know, never at any time was there any agreement or understand-

ing reached at any of these meetings, in Chicago or elsewhere, regarding the fixing of prices on plaster or other unpatented gypsum products?

A. That is right.

Q. You knew, didn't you, that price fixing under the May, 1929, license was applicable only to the patented articles made by your company?

A. That is right.

Q. And you further knew, didn't you, that it was applicable only to the first sale?

Mr. STEFFEN. As we have been told many times here, the document speaks for itself, and I see no reason for going into this question of what Mr. Brown knows. It is utterly immaterial. We have been told that hour after hour.

2051 Justice STEPHENS. I think that is not well taken,

Mr. Steffen. This is cross-examination, and the Government is contending that the officers of the defendants had subterfuge and a cloak in mind with reference to the use of these patents. Now it seems to me proper to cross-examine and ask what the witness' understanding of the agreements was, not to prove what the agreements contained but to prove his state of mind with respect to the charges of the Government.

Objection overruled.

By Mr. BROMLEY.

Q. You knew, didn't you, Mr. Brown, that the price fixing under the licenses was applicable only to the first sale, that is, your sale of the manufactured product?

A. Yes, sir.

Q. And you knew furthermore, didn't you, that the price fixing provision did not extend to any open-edge board that was not patented under some other patent.

A. Yes, sir.

Justice STEPHENS. Do you have an objection?

Mr. STEFFEN. I will object to the preceding answer on the ground that it calls for a conclusion. We argued all day yesterday on whether the contracts provided for a resale price fixing, and Mr. Bromley asks this witness if he didn't know that that contract was such-and-such. It seems to me that that goes much beyond reasonable cross-examination.

2052 Justice STEPHENS. Now there are two questions here. I don't understand counsel now to be examin-

ing upon the question of resale prices upon anything other than board manufactured, are you?

Mr. BROMLEY. That is all.

Justice STEPHENS. By the defendants?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. And as to the conclusion as to it, Mr. Steffen, it seems to the Court perfectly clear that what the witness believed, what his own state of mind was with respect to these agreements and their restrictions, is fair cross-examination in view of the contentions of the Government as to the subterfuge and cloak use of the patents.

Objection overruled.

By Mr. BROMLEY.

Q. And you knew, didn't you, Mr. Brown, that under the May license, that price fixing did not extend to any product at all after August 6, 1929?

A. Yes, sir.

Q. Now did you at any time ever receive any knowledge or intimation from USG as to what it would do in the future with regard to establishing the minimum price, under the licenses, of any patented article?

A. No, sir.

Q. Did you ever hear Mr. Avery or anybody else from USG make any promise, or did you ever have  
2053 any understanding with any of them, as to what price they would or would not fix under the licenses?

A. I did not.

Q. And isn't it a fact, sir, that you were given to understand by USG at all times that the fixing of the price was entirely in their discretion?

A. That is right.

Q. And isn't that, as a matter of fact, Mr. Brown, one of the reasons which made Mr. George M. Brown reluctant to take out the license?

A. I don't know.

Q. Did you ever have any understanding or agreement, or hear of any such, with respect to the disposition by your company of open-edge or second-grade board which you may have had on hand at the time of signing the license agreement?

The WITNESS. I think I will have to ask you to repeat that, if you will, or read it, please.

(The question was read by the reporter.)

The WITNESS. I don't remember anything about that.



By Mr. BROMLEY.

Q. Did you ever have any agreement or understanding that the manufacture of open-edge or second-grade closed-edge board would be discontinued after you took the license?

A. No, sir.

2054 Q. Did you ever have any understanding or agreement, or hear of any such, that you, as a licensee, would make and sell only board which came under the patents listed in the license?

A. No, sir.

Q. It was a fact, was it not, Mr. Brown, that at all times while you were with the company, closed-edge board was a superior product to open-edge board?

A. That is right.

Q. It also cost less to make, did it not?

A. I think that is correct.

Q. And it certainly was demanded by the trade, was it not?

A. Yes, sir.

Q. So far as you were concerned, did you ever see any reason, after you took the May license, why your company should make open-edge board?

A. No, sir.

Q. I refer you to Exhibit 236, which is Mr. Henley's memorandum to you. Will you look at the first paragraph?

A. Yes, sir.

Q. Notice that this memorandum is dated December 3, 1929, please. Do you see the reference to Open Edge Recut Wallboard?

A. Yes, sir.

2055 Q. Now isn't it the fact, Mr. Brown, that open-edge recut wallboard was patented board under the Haggerty starch patent?

A. Yes, sir.

Q. And isn't this memorandum a memorandum which merely has to do with the exercise of the licensor's right to fix a minimum price on patented board?

A. Yes, sir.

Q. Did you have anything at all to do with negotiations between Messrs. Avery and Holland as a result of which USG purchased the Haggerty and Hite patents?

A. I did not.

Q. So far as you knew, that was a matter solely between Messrs. Avery and Holland, wasn't it?

A. I knew nothing about it.

Q. And so far as you knew, no other company had any part in those negotiations, isn't that right?

A. I didn't know of any that did.

Q. And isn't it the fact that the first that you knew of the purchase of the Haggerty and Hite patents was when that fact was announced in Chicago by Mr. Avery?

A. That is right.

Q. Now, sir, did you ever make any agreement or understanding with anyone, or know of any such, that the use of adhesives to obtain bond between the core and the paper should be considered as falling within the scope of the Haggerty and Hite patents for the purpose of permitting price control?

A. No, sir.

Mr. STEFFEN. I object to that, Your Honor. I don't think that at all is within the direct-examination.

Mr. BROMLEY. That, as I understand it, was one of the purposes for your introducing one of the memoranda prepared by this man as to a Chicago meeting.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

2057 Justice STEPHENS. The Court has no recollection of any testimony or memorandum on that subject.

Mr. BROMLEY. Is it your position, may I ask, Mr. Steffen, that there is no such testimony through this witness?

Mr. STEFFEN. Decidedly not. What I am saying is that I don't recall any at all.

Mr. BROMLEY. Well, to shorten this, I think that can only be the purpose of the second paragraph in Exhibit 234, and I understood that that was the reason he put it in evidence.

Mr. STEFFEN. Let's take a look at Exhibit 234.

Justice STEPHENS. Read the question again, Mr. Reporter?

(Whereupon the question referred to was re-read by the reporter.)

Justice STEPHENS. The objection is overruled.

By Mr. BROMLEY.

Q. On page 2105 of the transcript you stated, Mr. Brown, that licensee meetings were held every sixty or ninety days, and I think your reference was to the years 1929 and 1930. Isn't it the fact that during those two years only one such meeting was ever held?

A. I think my testimony was that they might have been held every sixty or ninety days; it was not positive.

Q. Well, have you any recollection at all of any licensee meeting either in 1929 or 1930, sir?

2058 A. I can't remember as to the dates.

Q. Well, might your testimony with respect to the sixty or ninety day frequency have related to a period of time during the depression in 1932 to 1934?

A. It could have, I am not sure how many meetings were held in any given year.

Q. The fact is that you have no recollection at all that there was any such regularity as your sixty or ninety day answer created the impression?

A. It was purely a guess on my part.

Q. Now isn't it the fact, Mr. Brown, that the prices and terms and conditions of sale which you established on plaster and other unpatented gypsum products had no connection with the price bulletins issued by USG under the board licenses?

A. That is right.

Q. Your company was, was it not, free to, and did, sell these unpatented products at all times on such prices and on such terms as it chose?

A. We did that.

Q. Coming to metallized board, the testimony shows that you took a metallized license on November 2, 1934. Isn't it the fact that your company took that license in order to make the product?

A. That is what they intended to do at the time, as I remember it.

2059 Q. Well, as a matter of fact, sir, didn't they thereafter equip their plants and start to manufacture the product?

A. I think they did, but it was after I left the company.

Q. I show you what purports to be a memorandum from Mr. Laney to Mr. Irwin, dated December 6, 1935—will you give me that please, Mr. Steffen? It is one you have in your files that you didn't put in.

Mr. STEFFEN. Could you give us a description of it. I have no present recollection of it.

Mr. BROMLEY. It is from Laney to Irwin, dated December 6, 1935.

Having read that memorandum, sir, isn't your recollection refreshed —

The WITNESS. I haven't the memorandum.

Mr. BROMLEY. I withdraw the question.

Mr. STEFFEN. I would like the record to show that we

have just now, for the first time, seen it. We have no copy of that, Your Honor, except the one just handed to us by Mr. Bromley.

Mr. BROMLEY. I assure you that it is in the file that was subpoenaed because you took it from us and have kept it ever since.

Mr. STEFFEN. And I assure you that we don't know anything about it; we haven't seen it.

2060 Justice STEPHENS. Proceed with the examination.

This is just being used to refresh the witness' recollection for the time being, as I understand it, and has not been identified.

By Mr. BROMLEY.

Q. Have you read that memorandum?

A. Yes, sir.

Q. Doesn't that refresh your recollection so that you can now say that as a matter of fact the Certain-teed Products Corporation produced this metallized board in December, 1935?

A. No, sir, it doesn't refresh my memory.

Mr. BROMLEY. I will ask that this document be marked for identification as Defendants' Exhibit 5.

(The document referred to was marked as Defendants' Exhibit 5 for Identification.)

Justice STEPHENS. If there is a reasonable likelihood, without unduly restricting you, Mr. Bromley, of finishing with this witness tonight, we will be glad to hold over a little while longer than usual, although not very much longer because of the great pressure upon the court reporter's staff. We will hold over fifteen minutes.

Mr. BROMLEY. I should personally very much appreciate that and I can finish very shortly.

Justice STEPHENS. Will you have very much redirect, Mr. Steffen?

2061 Mr. STEFFEN. No, I do not think so, Your Honor, but I will have one or two questions.

Justice GARRETT. It will not be necessary for this witness to be here in connection with your offer of proof, as I understand it.

Mr. STEFFEN. That is my understanding.

By Mr. BROMLEY.

Q. Then you have no recollection that, as a matter of fact, you started to make this board at the end of 1935?

A. No, sir.



Q. And your recollection is that you didn't make it, and that it wasn't made up to the time you left the company?

A. That is my memory, yes.

2062 Q. Can you identify that as Mr. Laney's signature on Exhibit 5 for Identification?

A. Yes, I can identify that as his signature.

Q. Now will you look at Exhibits 247 and 248, sir. Looking first at Exhibit 247, aren't you able to say that this was a bulletin sent out by you after your company had taken the license to make the metallized board?

A. No, sir, I don't remember the date of the license.

Q. It was November 2, 1934.

A. Well, this doesn't seem to be dated, but I don't know for sure.

Q. Look at the bulletin, page 2 of that letter. Isn't it a fact, and didn't you know it at the time, that the bulletin only referred to metallized board manufactured by you?

A. Yes, sir; I knew that.

Q. Now the board that you bought from U.S.G. or from some other company you bought at a very small discount off the established price, didn't you?

A. That is right.

Q. Did you have any agreement or understanding as to what price you would fix for the resale of metallized board purchased from others?

A. No, sir.

Q. And you knew that the price bulletins sent out by the Licensors did not apply to such board, didn't you?

2063 A. Yes, sir.

Q. As a matter of fact, however, did you determine independently, and as a matter of your own policy, to sell the board that you bought at the same price as you did the board that you made?

A. We did.

Q. And after you got into production, if you still continued in isolated instances to buy board, it would have been impossible for you, or at least exceedingly ridiculous, to have fixed one price on the board you made, and another on the board of the same character that you bought, wouldn't it?

A. We priced them both the same.

Q. But the fact that you priced the purchased board the same as the board you made was a matter which you determined independently, without relation to any understanding with the licensors, isn't that right?

A. Yes, sir.

Q. Now at page 2104 of the record, in line 9, you testified that you thought that at one of the licensor's meetings something was discussed with regard to seconds or recut wallboard, but you said you didn't remember any of the details. Now isn't it a fact, Mr. Brown, that you have no recollection as to whether there was a discussion of seconds at a Licensor meeting, or not?

A. I think I have such a recollection.

2064 Q. Can you give us any idea as to the date of any meeting at which such a discussion might have occurred?

A. No, sir.

Q. Or can you identify such an occasion in any other way?

A. No, sir.

Q. Will you look at Exhibit 254, please, which is Mr. Van Hagan's memorandum of November 26, 1934, on metallized board. Isn't the reference in the last sentence of the first paragraph a reference to the Certain-teed price list and not to any U.S.G. price bulletin or price list?

A. I would say the reference is to Certain-teed's price list.

Q. In Exhibit 247, the licensor's price bulletin which constitutes page 2, you identified for Mr. Steffen by reference to the metallized price bulletins as being a bulletin dated October 30, 1934. Now having in mind that you executed and took your metallized board license on November 2, 1934, are you able to recollect that the bulletin dated October 30, 1934, was the then current bulletin in effect on November 2, 1934?

A. I don't remember.

Mr. BROMLEY. That is all.

Justice STEPHENS. Do any other defendants' attorneys wish to cross examine?

Mr. ADAMS. I don't think I have any questions but I would like about ten seconds to confer.

2065 Justice STEPHENS. Very well.

Mr. ADAMS. No questions.

Justice STEPHENS. Does any other defendant's counsel desire to cross examine this witness? If not, you may proceed with redirect examination.

#### REDIRECT EXAMINATION by Mr. STEFFEN.

Q. I think you testified, Mr. Brown, in regard to the use of starch, and stated that your company had been using starch since you started making board. Did you

make something of an investigation at that time, of the starch you were using?

A. Not until this Haggerty situation came up; so far as I know, we didn't.

Q. And what use of starch did you make, or rather, what use of starch did you find your company was making?

A. I think most of it was used as an adhesive.

Q. I want to know what type of starch you put in the board?

A. I don't know.

Q. Was it put in in dry form?

A. I can't answer that; I am not enough of a production man to know.

Q. Was it, perhaps, just some flour that was put in?

A. I have no way of knowing at all how they used it.

Q. Your investigation, then, didn't disclose any-  
2066 thing concerning the type of starch?

A. No, sir.

Q. Would you know whether you had machinery at that time for cooking starch at your plant which you would put into the board?

A. No, sir, I wouldn't know that.

Q. There was some testimony, in answer to Mr. Bromley's questions, in regard to whether there was any agreement or any discussion at your meetings in June and July and August, in Chicago, in 1929, concerning the discontinuance of an open-edge board. I believe you testified that—  
or what was your testimony on that?

A. There was none that I know of.

Q. No discussion?

A. That is right.

Q. Was there any understanding on your part that any of your companies would continue to make an open-edge board?

A. I don't recall anyone expressing themselves on that.

Q. Would it have been good business to have made an open-edge board?

A. We didn't think so.

Q. And what would be the objections to making an open-edge board?

A. Well, we went into the closed-edge, and these other patents, to get us better board, and we could see  
2067 no reason for making an inferior board.

Q. That is right. Would there have been price fixing of the inferior board?

A. No, sir.

Q. So that you could have sold it at a lower price?

A. Yes, sir.

Q. What would have been the disadvantages of making an open-edge board?

A. The trade didn't want it.

Q. That the trade didn't want it was one reason. Would you have had to pay a royalty on it?

A. Yes, sir.

Q. And would it have cost more to make?

A. I think it did cost more to make.

Q. So you would say that there was a tacit agreement that the open-edge board was out?

A. We didn't make it.

Mr. STEFFEN. We have no other questions, Your Honor.

Justice STEPHENS. Is there any recross?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Mr. Brown may be excused then, may he, gentlemen?

Mr. STEFFEN. Yes, with our thanks.

Mr. BROMLEY. Yes, Your Honor.

2068 Justice STEPHENS. Thank you for attending court, Mr. Brown, and we are very sorry to have taken so much of your time.

The WITNESS. Thank you. (Witness excused.)

Justice STEPHENS. Is there anything further? If not, announce a recess until tomorrow morning at ten o'clock.

(Whereupon, at 4:17 o'clock p.m., the hearing was recessed until Friday morning, December 17, 1943, at 10:00 o'clock.)

2069 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS



SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
Washington, D. C., Friday, December 17, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2079 Mr. Neale, will you please take the stand?

Thereupon, LAURANCE I. NEALE, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you please state your name for the record, sir?

A. Laurance I. Neale.

Q. I believe, sir, that you are the Minister of the Unitarian Church of All Souls, located at 80th Street and Lexington Avenue in the City of New York; is that correct?

A. That is correct.

Q. How long have you been Minister of that congregation, sir?

A. I have been there about, going into my fourth year.

Q. Were you ever engaged in the gypsum business?

A. Yes, sir.

2080 Q. With what company?

A. With three companies: first with the J. B. King & Company; then with United States Gypsum Company; and then with the Atlantic Gypsum Products Company.

Q. When did you enter the employ of the Atlantic Gypsum Products Company?

A. 1927.

Q. In what capacity?

A. As New York Division Sales Manager.

Q. And how long did you remain in the employ of the Atlantic Gypsum Products Company?

A. Until 1936.

Q. And is that the year that you entered the ministry?

A. No, I didn't enter the ministry immediately.

Q. Your first connection with the Atlantic Gypsum Products Company was as New York Division Sales Manager, is that correct?

A. That is correct.

Q. And how long were you employed in that capacity, sir?

A. About two years.

Q. Until 1929?

A. Yes.

Q. And from 1929 on, what was your office?

A. In 1929, as I recall it, I became General Sales  
2081 Manager.

Q. In charge of all sales of Atlantic Gypsum Products Company?

A. Yes. In 1930 I became Vice President.

Q. And you remained as Vice President until you left the company in 1936?

A. Correct.

Q. And as Vice President, were you in charge of sales, also?

A. Yes.

Q. The Atlantic Gypsum Products Company, at the time you entered it, sir, was a licensee of United States Gypsum Company under the Utzman patent. Are you familiar with that?

A. Yes, it was a licensee.

Q. Now what products, what gypsum products, did the Atlantic Gypsum Products Company make?

A. Almost a full line.

Q. That is, board—

A. (Interposing.) Various kinds of board and plasters.

Q. And block?

A. Yes.

Q. And where were those products sold, sir?

A. In the Eastern part of the country, from Maine, let's say, to Virginia.

2082 Q. And extending west how far?

A. Not very far.

Q. As far as Pittsburgh?

A. No, about the middle of Pennsylvania.

Q. About Harrisburg?

A. Yes.

Q. What type edge board did your company make from the time you came with it until you left?

A. A closed-edge board.

Q. Do you know when the Utzman patent expired, sir?

A. Do I know now?

Q. Yes.

A. I heard, while I have been sitting around court here the last few days, that it expired in 1929, but I had forgotten that.

Q. As Sales Manager, in 1929, were you directly in charge of the sales of the company?

A. I don't know as I quite understand your question, Mr. Knuff.

Q. Well, what I meant was—were you the Sales Manager in fact as well as in name?

A. I think so, except that Mr. Fuller, who was the chief executive officer, had something to say about all features of the business.

Q. Now in your sales of gypsum board, did you 2083 ever receive from the United States Gypsum Company so-called bulletins?

A. Yes, sir.

Q. And were your sales made in accordance with the bulletins that you received?

A. Yes, sir.

Q. And you adhered to the bulletin prices?

A. As I recall it, we did our level best to.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 279, the same being a letter dated May 24, 1927, addressed to Mr. Sewell L. Avery, and signed by Willard P. Fuller. Who was Mr. Fuller?

A. Mr. Fuller at that time was Treasurer of the company. He later became President.

Q. Are you familiar with Mr. Fuller's handwriting?

A. Yes.

Q. Would you say that the letter you have before you was signed by Mr. Fuller?

A. I should.

Q. It was?

A. Yes, sir.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit No. 279.

Justice STEPHENS. The Court will read it. Is there any objection?

2084 Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 279, was received in evidence.)

By Mr. KNUFF.

Q. I also show you Government's Exhibit No. 280, the same being a letter of May 29, 1929, addressed to Mr. W. P. Fuller, with no signature appearing thereon, and the letter

of May 29 apparently being a copy of a letter that was sent to Mr. Fuller; also Exhibit 281, the same being a letter dated May 31, 1929, addressed to Mr. S. L. Avery and signed Willard P. Fuller. Will you please look at these two exhibits, sir?

A. Yes, sir.

Q. Have you read Exhibit No. 281, sir?

A. Yes, sir.

Q. Would you say that the signature, "Willard P. Fuller", is Mr. Fuller's signature to that letter?

A. I believe it to be.

Mr. KNUFF. We now offer in evidence, if Your Honor please, Government's Exhibits 280 and 281, Exhibit 280 being connected internally by reference to Government's Exhibit 281.

Mr. BROMLEY. Only the usual objection, sir.

2085 Justice STEPHENS. Received, subject to the usual reservation with reference to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 280 and 281, were received in evidence.)

Mr. KNUFF. For the time being, if Your Honors please, will you please skip the next two exhibits in the file, the one marked "Return to W.P.F." and the other headed "Gypsum Industry, 1929", and consider the letter of July 22, 1929.

By Mr. KNUFF.

Q. I show you, Reverend Neale, Government's Exhibit 282, the same being a letter dated July 22, 1929, addressed to Mr. W. H. Baker and purporting to be signed by L. I. Neale. Will you please look at it, sir?

Justice GARRETT. That is M. H. Baker, isn't it?

Mr. KNUFF. Yes, M. H. Baker.

Justice STEPHENS. Have counsel those charts which my law clerk prepared for our use?

Mr. BROMLEY. I have one here.

Justice STEPHENS. We need to have something of that sort before us to keep the relationship of all these predecessor companies in mind.

Justice JACKSON. Have you checked it, Mr. Bromley?

Mr. BROMLEY. I haven't completed my check.

2086 Justice STEPHENS. Well, we will only refer to it for the purpose of seeing the antecedent corporations.

Justice JACKSON. There is another one?

Mr. KNUFF. I have the other one.



Justice STEPHENS. Let us use it for the time being.

Mr. KNUFF. Unfortunately, it is over in my office.

Justice JACKSON. Bring it back the first time you are over there.

Mr. KNUFF. Yes, I will.

Justice STEPHENS. We will have to institute a system of issuing checks for these exhibits.

By Mr. KNUFF.

Q. Will you state, sir, whether the signature appearing on that letter is your signature?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 282.

Mr. BROMLEY. Only the usual objection, if the Court please.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 282, was received in evidence.)

2087

By Mr. KNUFF.

Q. In connection with Exhibit 282, you will notice that that is addressed to Mr. M. H. Baker. Do you know Mr. Baker?

A. Yes, sir.

Q. How long had you known him?

A. At that time?

Q. Yes.

A. I don't know.

Q. A matter of years?

A. Three or four years.

Q. And you will notice further, Mr. Neale, in the first paragraph, you ask to be pardoned for your delay in acknowledging the receipt of a letter from Mr. Baker dated July 12. Do you notice that?

A. Yes, sir.

Q. Do you recall what was in that letter of Mr. Baker's of July 12?

A. I have no idea.

Q. No idea?

A. That is right.

Q. In the second paragraph of that letter, you state that Mr. Fuller, Mr. Channing and yourself were planning to arrive at Chicago on Wednesday. Who was Mr. Channing?

A. He was; I think, at that time, the Secretary of the company, and the General counsel.

Q. And Mr. Fuller is the gentleman whose signature you have identified in the previous exhibits, is that correct?

A. Yes.

Q. Did you go out to Chicago at that time?

A. I don't remember.

Q. Do you recall any visits to Chicago in company with Mr. Fuller and Mr. Channing at or about that time?

A. I couldn't say that I recall any at or about that time. I have made numerous trips with them.

Q. The letter doesn't refresh your recollection as to any trip that you made then, is that correct?

A. It does not, no.

Q. At about that time, what would be your reason for going to Chicago, if you went there?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Mr. KNUFF. The reason for going—it is a preliminary question.

Justice STEPHENS. It seems quite speculative to the Court, but since counsel states it is preliminary, the objection is overruled, and the answer may be received subject to a motion to strike.

Mr. KNUFF. Read the question.

(The question was read by the reporter.)

2089 The WITNESS. I don't know.

By Mr. KNUFF.

Q. Well, at or about that time, do you know whether or not there was a proposed license agreement for the manufacture of board by the so-called bubble process?

A. I should say at about that time, yes.

Q. Did you make any trips to Chicago in connection with that proposed license?

A. I may have, I don't recall now.

Q. You can't recall?

A. No.

Q. You will notice in the last paragraph of that letter you make reference to a foam board contract. Do you notice that?

A. Yes, sir.

Q. Does that refresh your recollection in any way?

A. Not in reference to any meeting.

Q. It doesn't?

A. No. The foam board contract is what you have just referred to as the bubble contract.

Q. And this third paragraph doesn't refresh your recollection?

A. It does not.

Q. I show you, sir, what has been marked for Identification Government's Exhibit No. 283, the same being 2090 a letter dated August 9, 1929, addressed to M. H. Baker, President, and signed Willard P. Fuller. Will you please look at that letter?

A. Yes.

Q. Will you state, Mr. Neale, whether or not you recognize Mr. Fuller's signature?

A. Yes, that is his signature.

Q. At the bottom of the letter, I notice the interlineation "Why not in Cape Breton—August 25-30?" Do you know whose writing that is?

A. I should say that was Mr. Fuller's.

Mr. KNUFF. We offer in evidence, if Your Honor please, Government's Exhibit No. 283.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 283, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification Government's Exhibit 284, the same being a letter dated August 29, 1929, addressed to Mr. M. E. Baker, and purporting to be signed L. I. Neale. Is that your signature, sir?

A. It is.

2091 Mr. KNUFF. We offer in evidence Government's Exhibit No. 284.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 284, was received in evidence.)

By Mr. KNUFF.

Q. I notice that the addressee's name is written "M. E. Baker". Is that a typographical error?

A. I would think it must be, yes.

Q. It should be M. H. Baker?

A. Yes.

Q. The Mr. Baker that you had reference to in this letter was the same Mr. Baker that you wrote to under date of July 22, is that correct?

A. Yes.

Q. In Exhibit No. 282?

A. The same Baker.

Q. I call your attention to the statement, "I am a little out of touch with the board situation in Chicago". Do you notice that in the first paragraph?

A. Yes, sir.

Q. What does that have reference to, sir?

2092 A. I don't know to what, in particular.

Q. What is your best recollection as to what it has reference to?

A. I have no specific recollection as to what it may have reference to.

Q. Does it have reference to the foam board contract?

A. I would judge so, from what appears in the second paragraph, but I have no recollection of it.

Q. I notice that you state, in the first paragraph, that there was some difference between the National Gypsum Company and the Universal Gypsum & Lime Company.

A. Yes, sir.

Q. Do you know what that difference was?

A. No, I do not.

Q. In the second paragraph of your letter, you say, "I would appreciate very much if you would let me know promptly the present state of affairs in regard to the getting together of various manufacturers." Do you notice that?

A. Yes, sir.

Q. What "various manufacturers" did you have in mind at that time?

A. I don't know.

Q. Well, who were the gypsum manufacturers that were in business manufacturing board in August of 1929?

A. Well, I don't know that I can state them all, now.

2093 Q. Well, let's see if I can help you.

A. There was Atlantic, U. S. Gypsum, National Gypsum, Ebsary Gypsum, Certain-teed Products, Universal Gypsum & Lime Company, Kelly Plasterboard Company, and there may have been others.

Q. American?



A. Yes, American.

Q. Texas?

A. As far as I know.

Q. Would you say that those were the various manufacturers that you had in mind when you wrote this letter?

A. I would have no way of knowing now, Mr. Knuff.

Q. You haven't any recollection at all as to that?

A. I have no recollection of the letter or the matter to which it refers.

Q. I notice that there are some shorthand notes on the bottom of that letter. Do you notice those? At least I take them to be shorthand characters.

A. I see some scribbles there, yes.

Q. Do you write shorthand?

A. I do not.

Q. They are not your notes?

A. No, they are not. If you will turn it upside down, one of those looks like 284, which is your exhibit number.

[Laughter.]

2094 Q. I grant that it does, but that just happens to be a coincidence.

Justice STEPHENS. The witness apparently implies, Mr. Knuff, that your handwriting looks like shorthand.

[Laughter.]

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 285, the same being a letter dated May 2, 1932, addressed to the United States Gypsum Company, Attention of C. F. Henning, and signed by Atlantic Gypsum Products Company, Inc.—L. I. Neale, Vice President.

A. Yes, sir.

Q. Is that your signature?

A. Yes, it is.

Mr. KNUFF. We offer in evidence Government's Exhibit 285.

Mr. BROMLEY. And we have only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 285, was received in evidence.)

By Mr. KNUFF.

Q. Was Structural Gypsum Corporation a licensee of USG at this time?

A. I don't know; but I think not.

2095 Q. Well, your letter states that they were a non-licensee, does it not?

A. Yes.

Q. Now you were making inquiry of United States Gypsum Company to find out the price that Kelly Plasterboard Company was selling gypsum products to the Structural Gypsum Corporation at, were you not?

A. Yes, sir.

Q. What did you want that information for?

A. I must have had some suspicion that it was not, perhaps, a correct price. I don't recall the incident.

Q. And you will notice that you made inquire as to whether or not the minimum of 5,000 square feet for pick-ups was being enforced in regard to the sales of patented board by the Structural Gypsum Corporation. Now do you notice that?

A. Yes, sir.

Q. Will you tell us what the purpose of that inquiry was?

A. Well, I can't say, at this time, what was the purpose of the inquiry at that time. I would surmise that I felt it was information which was proper for me to have.

Q. What did you expect, if you expected anything, the United States Gypsum Company to do in case Structural Gypsum was selling less than 5,000 square feet?

2096 A. I don't know that I expected them to do anything.

Q. Do you want us to understand that you didn't expect USG to take any action at all on the letter?

A. I am sure I don't know, Mr. Knuff, at this remote period from that occasion, but I should imagine, as I read this thing, that I wanted to be informed of the facts in reference to the pick-ups.

Q. And can you tell us why you wanted to know about Structural's policy?

A. Structural was selling board in this area.

Q. Did you think that Structural, being a non-licensee, that you could get your information from the licensor?

A. I thought possibly, or I must have thought, that the licensor, through the party who had made the sale, could get the information. That was the natural place to look, I should think.

Q. You will notice that you are using the words, "the licensor's bulletin of May 12 is being enforced in regard to sales of patented board by Structural Gypsum". Did you expect the United States Gypsum Company to enforce that bulletin of May 12?

A. No, I wouldn't expect so.

Q. What is that?

A. I wouldn't expect so, as I look back at it now.

Q. Then all that you wanted was just information?

2097 A. Well, I don't know, Mr. Knuff, just what I may have wanted.

Q. Then do you mean to say that you haven't any present recollection of the purpose of that letter?

A. Other than I have stated.

Q. At that time there was a regulation in effect limiting or prescribing, rather, a minimum quantity of 5,000 square feet for pick-ups in the metropolitan area?

A. I assume so, from reading this letter.

Q. And did you have any information that Structural was selling quantities less than 5,000 square feet?

A. I don't know, at this time, Mr. Knuff. This happened 14 years ago, or something like that—11 years ago. It was my business, being in charge of sales, to know as much as I could about what all my competitors were doing.

Q. Well, why didn't you write to Structural? They would know their policy better than you.

A. One doesn't always find out about prices by writing direct to the company that makes the price.

Q. What is that?

A. One doesn't always find out about a competitor's prices by writing to that company. [Laughter.]

Q. It wasn't a question of price, was it? It was a question of quantity.

A. Well, of quantity, then.

2098 Q. Did you undertake to make any investigation, any other independent investigation? You were located in New York at that time.

A. I don't remember, Mr. Knuff.

Q. You don't remember?

A. No. It was just an incident in a busy life.

Q. I show you, sir—

Mr. BROMLEY (interposing). Before you leave the subject, don't you have an answer to the letter, Mr. Knuff?

Mr. KNUFF. If I had it, I would have it here.

Mr. BROMLEY. I take it you mean you don't have the answer?

Mr. KNUFF. There may be an answer over in the Department of Justice someplace, but I have never seen the answer to it.

Justice GARRETT. What about this Structural Gypsum Corporation? That hasn't been referred to as a company engaged in this—

Mr. KNUFF (interposing). Structural was not a licensee. They were what we consider a manufacturing distributor, that is, they manufactured other gypsum products but bought board from licensees of USG at a discount.

Mr. BROMLEY. This was one of the manufacturing distributors whose prices were alleged to have been fixed illegally, and which issue was tried in the criminal 2099 case, and the letter to which I refer was an exhibit in the criminal case, as these gentlemen must know by this time.

Mr. KNUFF. Apparently there is some confusion as to Structural. Maybe this witness can clear it up.

Justice GARRETT. I think I understand it.

Justice STEPHENS. No, that is clear now. Go right ahead.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 286, the same being a letter or memorandum, dated March 30, 1933, having on the left-hand corner the typed names, "W. P. Fuller", and directly below that "L. I. Neale", and directly below that "Leon H. Fleming", and signed by Atlantic Gypsum Products Co. Inc., L. I. Neale, Vice President. Will you please look at that exhibit?

Is that your signature, sir?

A. It is.

Mr. KNUFF. I offer in evidence Government's Exhibit No. 286.

Mr. BROMLEY. We have only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 286, was received in evidence.)

2100

By Mr. KNUFF.

Q. Was Leon H. Fleming an employee of the Atlantic Gypsum Products Company, sir?

A. He was an employee of F. B. Lawton, Inc.

Q. And who was F. B. Lawton, Inc.?

A. He was a man stationed in Providence, Rhode Island, who sold our products.



Q. That is, Atlantic Gypsum Products Company had a dealer in Providence by the name of F. B. Lawton, Inc.; is that correct?

A. I should not describe him as a dealer, no.

Q. What was he?

A. He was a sales agent.

Q. Were the sales made to the F. B. Lawton Company?

A. No.

Q. Did he act as agent for Atlantic Gypsum Products Company?

A. He did.

Q. Was he on the Atlantic Gypsum Products Company payroll?

A. I don't recall the method of his remuneration. The goods he sold was the property of the Atlantic Gypsum Products Company.

Q. And were they consigned to him?

A. No, sir.

2101 Q. Were they shipped on his order?

A. He acted as order-taker for the Atlantic Company.

Q. Then he was an employee, F. B. Lawton, Inc., was an employee of the Atlantic Gypsum Products Company; is that what you mean?

A. Yes, I think that is the way to state it.

Q. And do you know how he was paid?

A. I just said that I don't recall the exact manner of his remuneration.

Q. Was it on a commission basis or on a salary basis?

A. I think it varied at different times, Mr. Knuff.

Q. What do you mean by "it varied at different times"?

A. I mean I think there were periods when he was on a salary basis, and there were other periods when he was on a commission basis.

Q. Now we are speaking of Mr. Lawton?

A. No, we are talking about F. B. Lawton, Inc.

Q. That is right. You said "he" was, and I assumed you were talking about an individual.

A. That was a slip, I meant the corporation.

Q. The corporation was the selling agent for the Atlantic Gypsum Products Company in Providence, Rhode Island, is that correct?

A. That is correct.

2102 Q. And Leon H. Fleming was an employee of F. B. Lawton, Inc.?

A. That is correct.

Q. Do you know how he was paid?

A. I think he had a straight salary.

Q. Does this letter refresh your recollection as to what occurred at the licensee meeting that is referred to there?

A. It doesn't refresh my recollection of a particular meeting. It does call to mind, though, that this matter was brought up to me for an answer.

Q. At some meeting at or about this time, this matter was brought up, is that correct?

A. I would assume so, yes.

Q. And who attended the board licensee meeting, other than yourself and Mr. Henning, if you recall?

A. I don't even recall the meeting.

Q. Had you previously attended board licensee meetings?

A. I would say so, yes, sir.

Q. And do you recall who attended any of the previous meetings?

A. Not specifically, no.

Q. What companies were represented?

A. I can't say. I presume that the various licensees were represented by someone, but whether all were always present, I don't remember.

2103 Q. How often were these licensee meetings held?

A. I am sure I don't recall.

Q. Was it a matter of every month?

A. I doubt if it was as often as that.

Q. Would you say as often as once every 3 months?

A. I couldn't say.

Q. As often as once a year?

A. I would think oftener than that.

Q. Well, then, between once a year and once every 3 months, can you give us something definite as to that?

A. I am sorry, but I can't.

Q. I see. And do you recall whether representatives of USG attended those meetings?

A. I can't imagine a meeting of board licensees being held without them.

Q. That is right. And your company, of course, was represented by yourself, and was there any other person?

A. I think Mr. Fuller probably attended some of them. I don't know that the company was always represented at these meetings.

Q. When did you first begin to attend licensee meetings, if you recall?

A. I don't.

Q. Was it as early as 1929?

A. I couldn't say, Mr. Knuff. I don't remember 2104 when the first meeting was held.

Q. But you do say that you had attended meetings previous to the date of this memorandum?

A. It is my general recollection that I did, yes. I would say so.

Q. Was National represented at those meetings?

A. I don't remember who was there at any special meeting, any individual meeting.

Q. You can't recall whether any other companies, other than yours and USG, were ever at any of these meetings, is that correct?

A. I am sure other companies were represented.

Q. But you don't recall who they were?

A. No, I don't.

Q. No, I don't.

Q. Who was the Board Survey Company?

A. I am pretty hazy on that. As near as I can remember, it was an organization which sought to see if the license was being complied with.

Q. Now in the second sentence of the first paragraph, you say, "You will recall that some time ago the Board Survey Company asked us about Fleming's remuneration". What occasion were you recalling to Mr. Fuller's attention at that time?

A. I don't know that I was recalling any occasion. I was evidently reminding him of the request for information 2105 tion by the Board Survey Company.

Q. You will notice your words are, "You will recall". Now what were you asking him to recall?

A. That we had been asked for information in reference to Fleming's status.

Q. And that you "replied that Fleming was an employee of F. B. Lawton, Inc."

A. Yes, sir.

Q. Now in the third paragraph of the letter, you say, "The question which was asked about Fleming is also asked about the salesmen of the Oakfield Gypsum Products Corp. and the Structural Gypsum Corp. both of which companies purchase board from Kelley." Do you notice that?

A. Yes, sir.

Q. Was that same question raised?

A. The letter so states.

Q. And is that your present recollection?

A. I have no recollection in reference to it.

Q. Well, do you care to make any correction, then, to the third paragraph?

A. How can I make a correction about something I don't recall?

Q. Then you don't care to make any correction to what is contained in that third paragraph?

A. I answered that, Mr. Knuff.

2106 Q. I don't believe you have answered the question.

A. Why should I wish to correct it? It is a letter that I wrote in 1933. Presumably what I said was correct.

Mr. KNUFF. If Your Honor please, I am not the witness, and the witness is asking me questions.

Justice STEPHENS. That is very true, but I think, Mr. Knuff,—and I think my colleagues agree with me,—that you have practically asked the witness to do that, because he has stated frankly that he has no recollection whatever of the facts stated in the third paragraph. Yet you ask him if he wants to correct it. He is almost bound to say to you, "How can I correct it if I don't have any memory about it?"

By Mr. KNUFF.

Q. Who was the Tomkins-Rockwall Corporation, sir?

A. That was a selling agency.

Q. Of what company?

A. Of the Atlantic Gypsum Products Company.

Q. Was board sold by the Atlantic Gypsum Products Company to the Tomkins-Rockwall Corporation?

A. No, sir.

Q. What were the arrangements that Atlantic Gypsum Company had with the Tomkins-Rockwall Corporation?

A. The Tomkins-Rockwall Corporation acted as a sales agency for the products of Atlantic.

Q. And how were they paid?

2107 A. I think on some basis of sales made.

Q. A commission?

A. I don't remember specifically, Mr. Knuff.

Q. Now in case the Tomkins-Rockwall Corporation sold board to an individual, and that individual failed to pay the bill, who stood the loss, Atlantic or Tomkins-Rockwall?

A. The Atlantic.

Q. The Atlantic Gypsum Products Company was the loser in a transaction of that kind, is that what you mean to say?

A. Yes, sir.

Q. And was the same thing true with the F. B. Lawton Company?



A. Yes, sir.

Q. In other words, it is your understanding that the F. B. Lawton Company and the Tomkins-Rockwall Corporation were not *del credere* agents?

A. Well, you will have to pardon my ignorance. I don't know the meaning of that word.

Justice STEPHENS. You are not expected to know legal terminology.

By Mr. KNUFF.

Q. Who was the Oakfield Gypsum Products Corporation?

A. That was a company located in Oakfield, New York.

Q. Were they sales agents for Atlantic Gypsum Products Company?

2108 A. No, sir.

Q. And did they sell Atlantic Gypsum Products Company board?

A. No, sir, not that I know of.

Q. Was Structural a sales agent for Atlantic Gypsum Products Company?

A. No, sir.

Q. And, as your letter states, both Structural and Oakfield, as was your understanding at that time, purchased board from Kelley Plasterboard Company; is that correct?

A. Both Structural and Oakfield?

Q. Yes.

A. I don't remember from whom Oakfield purchased board.

Q. The third paragraph of your letter—does that refresh your recollection as to where they purchased their board?

A. It so states.

Q. I show you what has been marked for Identification as Government's Exhibit 287, the same being a letter dated August 20, 1934, addressed to L. I. Neale, and signed by C. Henning, Vice President. Did you receive that letter, Mr. Neale?

A. I presume so.

Q. I notice on the upper righthand corner of the letter, there is a received stamp that says—"Received  
2109 Aug 22 1934—A. G. P. Co.—New York Sales". Is that the receiving stamp that was used in your office at that time?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if Your Honors please, Government's Exhibit 287.

Mr. BROMLEY. And we make only the usual objection.

Justice STEPHENS. It may be received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 287, was received in evidence.)

Mr. KNUFF. I wonder if I may have about two minutes—

Justice STEPHENS (interposing). We will take a five-minute recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Mr. BROMLEY. May it please the Court, in so far as the past testimony in the record concerning resale price fixing is concerned, and so far as any future testimony that may be introduced into the record on that subject is concerned, may the defendants have a general objection to it on the ground that it is immaterial and irrelevant, because the precise issue has heretofore been determined as between the parties to this suit.

2110 Justice STEPHENS. Does that go to the class of testimony concerning which the Court ruled day before yesterday?

Mr. BROMLEY. No, sir, it only goes to the class of testimony as to which this witness has testified this morning, in so far as there has been a reference to the resale prices of manufacturing distributors, such as the Structural Gypsum Corporation.

Justice STEPHENS. You object to it on what ground?

Mr. BROMLEY. On the ground that it is immaterial and irrelevant, because it has heretofore been determined as between these parties.

Justice STEPHENS. You mean in the criminal proceeding?

Mr. BROMLEY. Yes, sir. I make the objection, being aware of the fact that we have an affirmative defense in the answer, but not being able to answer the legal question myself as to whether an objection is necessary. I believe it not to be necessary, but lest it be deemed at some future time that the defendants have waived something by not objecting to it, I ask permission for the record to show that the defendants, and all of them, may have a general objection to this line of testimony.

Justice STEPHENS. You have a right to make the objection. I just want to be sure I understand it before ruling on it.

Is it on the theory of *res adjudicata*?

2111 Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Then it is overruled. The record may show the objection.

Mr. KNUFF. Will you show the witness Exhibit No. 286, please?

(Exhibit 286 handed to the witness.)

By Mr. KNUFF.

Q. Was F. B. Lawton, Inc., mentioned in Exhibit 286, on the payroll of the Atlantic Gypsum Products Company, or was F. B. Lawton as an individual on the Atlantic payroll?

A. It is my recollection that F. B. Lawton, Inc., was.

Q. F. B. Lawton, Inc., was on the payroll of the Atlantic Gypsum Products Company?

A. That is my present recollection.

Q. And that Mr. F. B. Lawton individually was an employee of F. B. Lawton, Inc.?

A. Yes, sir.

Q. That is your present recollection?

A. Yes.

Q. Now is that true, likewise, of the Tomkins-Rockwall Corporation?

A. I don't think it was quite the same, as I recall it.

Q. What is your recollection as to the status of the Tomkins-Rockwall Corporation?

2112 A. As I remember it, the Atlantic Gypsum Products Company had a controlling interest in that corporation.

Q. That is, they had a stock interest in the Tomkins-Rockwall Corporation?

A. That is my recollection.

Q. The Tomkins-Rockwall Corporation and the Atlantic Gypsum Products Company were affiliated corporations, would you say that is correct?

A. Well, in that sense of the word.

Q. The arrangements that the Atlantic Gypsum Products Company had with the F. B. Lawton, Inc., and the Tomkins-Rockwall Corporation, were they oral or were they in writing, if you know?

A. I think the one with the Tomkins-Rockwall Corporation was in writing. I don't recall as to the Lawton arrangement, whether it was in writing or verbal.

Q. What happened, if you know, to the Atlantic Gypsum Products Corporation? Are they in existence today?

A. No, sir.

Q. Do you know which of the defendants purchased the assets or the stock of the Atlantic Gypsum Products Company?

A. The National Gypsum Company.

Q. Do you know when that was?

A. In 1936.

Q. Now then, referring to Exhibit 287, I believe you did state that you received that letter from Mr. Henning?

2113 A. I think so, yes.

Q. Do you recall the licensee meeting of May 23, 1934, referred to in the first paragraph of Exhibit 287?

A. Not specifically.

Q. Do you have any recollection as to who attended that licensee meeting?

A. I don't recall the particular meeting, Mr. Knuff.

Q. You don't?

A. No, sir.

Q. I notice at the bottom of the letter the request for you to give to Mr. Henning your comments or criticisms; do you notice that?

A. Yes, sir.

Q. Did you comply with that request, if you remember?

A. I don't remember.

Q. You haven't any recollection of it?

A. No, sir.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 288, the same being a letter dated September 6, 1934, addressed to the Atlantic Gypsum Products Company, Attention L. I. Neale, and signed C. Henning, Vice President. Do you recall receiving that letter?

A. I don't recall receiving it, no, sir.

Q. I notice there is a receiving stamp on the upper right-hand corner of that letter. Is that the stamp that  
2114 your New York office used on incoming mail?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 288.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 288, was received in evidence.)



1264

2115 By Mr. KNUFF:

Q. Does this letter serve to refresh your recollection of the matters that were discussed in this letter?

A. It serves to remind me of the proposition to license manufacturers to manufacture reflective board, yes, sir.

Q. You say your recollection to that extent is refreshed?

A. Yes, sir.

Q. Do you know who the contemplated licensees of this reflective board license were going to be?

A. I don't recall, but I think they must have been the licensees already in existence on other patents.

Q. Do you know whether or not your company did become a licensee of USG to manufacture the so-called metallized plaster board?

A. I don't remember.

Q. For your information it is in evidence in this case, Mr. Neale, that the Atlantic Gypsum Products Company became a licensee of United States Gypsum Company on the 30th of November, 1934.

Do you recall whether or not you had any conversation with other manufacturers concerning the metallized board license agreement?

A. I don't recall any specific conversation.

Q. Do you recall any general conversation?

A. I recall talks with Mr. Fuller about the mat-

2116 ter. I don't recall talks with other manufacturers.

Q. I show you what has been marked for identification as Government's Exhibit No. 289, the same being a memorandum, dated September 6, 1934, addressed to Mr. L. I. Neale, and typed thereon is the name "Willard P. Fuller". Will you please read that?

A. Yes.

Q. About this time did your company use, for inter-office communications, memoranda forms similar to the one that has been marked Government's Exhibit 289?

A. Yes, sir.

Q. And the form that this memorandum appears in is the usual form that was used for inter-office memoranda, is that correct?

A. Yes, sir.

Q. I notice after the name "Willard P. Fuller" there is a check mark—do you notice that?

A. Yes, sir.

Q. Do you know what that indicates?

A. No, I do not.

Q. Do you know where this memorandum originated, in what office, in your New York office or in some other office?

A. Presumably it was written in the Boston office.

Q. And it was addressed to you?

A. It is addressed to me.

2117 Q. And what was Mr. Fuller's habit as to signing memoranda of this kind, did he always sign them or sometimes have his name typed on them?

A. Frankly I don't recall. I imagine there were some of both.

Q. At that time you were the vice president in charge of sales?

A. Yes, sir.

Q. And the subject of this memorandum would come under your jurisdiction, would it not?

A. Yes, sir.

Q. Do you recall receiving this memorandum?

A. Not the receipt of this particular memorandum, no, sir.

Q. Do you notice the wording contained in the memorandum, and is that the style that Willard P. Fuller was accustomed to use?

A. I have no reason to doubt that he wrote this letter.

Q. You haven't any reason to doubt it at all?

A. No, sir.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 289.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

2118 (The document marked as Government's Exhibit No. 289 was received in evidence.)

By Mr. KNUFF.

Q. I now show you what has been marked for identification as Government's Exhibit 290, the same being a letter dated November 30, 1934, addressed to L. I. Neale, vice president, and signed C. Henning, vice president. Will you please look at it?

A. Yes, sir.

Justice STEPHENS. What did you say the date of the metallized board agreement was?

Mr. KNUFF. The metallized board agreement was dated November 30, 1934.

By Mr. KNUFF.

Q. Did you receive Government's Exhibit 290, Mr. Neale?

A. I don't remember.

Q. You will notice on the upper right-hand corner the receiving stamp, "A. G. P. Co.—New York Sales". Is that the stamp that was used in the New York office for incoming mail?

A. It is.

Mr. KNUFF. I offer in evidence Government's Exhibit 290.

Mr. BROMLEY: Only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 290 was received in evidence.)

Justice STEPHENS. You haven't identified Mr. Henning's signature. Do you want to do that?

Mr. KNUFF. I don't know whether this witness can identify his signature or not.

By Mr. KNUFF.

Q. Do you know Mr. Henning's signature?

A. In a general way.

Q. Would you say that that is his signature?

A. I couldn't swear that he actually wrote it. It looks familiar.

Q. Notice in the first sentence of the second paragraph where Mr. Henning says, "I expect to be in New York Wednesday, December fifth, and will go over this entire matter with you". Do you recall whether or not Mr. Henning did meet with you on or about December 5th, as he states in the last paragraph?

A. I do not recall.

Q. You haven't any recollection?

A. No.

Q. I show you what has been marked for identification as Government's Exhibit No. 291, the same being  
2120. a memorandum, dated the 30th day of November, 1934, addressed to L. I. Neale, from Mr. R. H. Hallowell, on the subject of nickel-plated gypsum lath, and at the bottom of the memorandum appear the initials "R.H.H."

Justice STEPHENS. While the witness is considering the exhibit, let the Court make an inquiry, Mr. Knuff, concerning Exhibit 289, the third line, where there is a reference

to "Alfol patents". What is meant by "Alfol patents"? Is that a trade-name for the metallized board?

Mr. KNUFF. My understanding of "Alfol" is that that was—

Justice STEPHENS (interposing). It sounds like an abbreviation for aluminum foil.

Mr. KNUFF. I believe that was a separate corporation which, I think, owned the basic patent on metallized board, and USG was a licensee of Alfol—is that correct?

Mr. BROMLEY. Yes, exclusive licensee in certain fields, and there were several patents.

In other words, as I understand it at the moment, the reference to "Alfol patents" is a reference to the patents under which the so-called foil or metallized board was made, which patents were licensed by USG to some of the licensees.

Justice STEPHENS. Thank you.

Mr. BROMLEY. Plus some other patents.

By Mr. KNUFF.

Q. Have you looked over Exhibit 291, sir?

2121 A. Yes, sir.

Q. You will notice that the exhibit bears the receipt stamp of "A. G. P. Co.—New York Sales".

A. Yes, sir.

Q. Is there any doubt in your mind that that came to the New York office?

A. No, sir.

Justice STEPHENS. Who is Mr. Hallowell?

Mr. KNUFF. I was coming to that.

We offer in evidence, if your Honor pleases, Government's Exhibit No. 291.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Received, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 291 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Neale, who is R. H. Hallowell?

A. New England Division sales manager.

Q. He was located in Boston?

A. Yes, sir.

Q. And the "Willard" that is referred to in the first paragraph of the letter is Mr. Fuller?

A. Undoubtedly.



2122 Q. Had you any conversation with Mr. Fuller at or about this time concerning the purchase of metallized board?

A. I don't recall any specific conversation.

Q. Well, do you recall any general conversation?

A. I can recall talking to him about board. Whether it was just at this time, or not, I don't remember.

Q. I am particularly interested at this time in the metallized board. Do you recall any conversation that you had with Mr. Fuller about purchasing metallized board either from National or USG or from any other company?

A. I don't recall any definite conversations about the purchase of metallized board. I do recall talking to him about the board-license.

Q. The metallized board license?

A. Yes, sir.

Q. Can you state your best recollection as to what that conversation was?

A. It consisted of whether or not it was desirable to take such a license.

Q. And you haven't any recollection, then, as to whether or not you did talk about purchasing this board from USG, or National?

A. I don't recall anything specifically.

Q. Will you tell us why you felt it was desirable to take out a license for this metallized board? Probably  
2123 that question is not worded the way it should be worded. Will you tell us what your conversation was concerning the advisability of taking out a metallized board license contract?

A. I can't report on my conversation. I can give you what I feel was my point of view in reference to it at that time.

Q. What was your point of view at that time?

A. That it was desirable to have such a license arrangement.

Q. There was a sales demand for it, was there?

A. There was an increasing sales demand for that type of board.

Q. Now did your company subsequently manufacture metallized board?

A. As I recall it, they did.

Q. When did they begin to manufacture it, if you recall?

A. I don't remember.

Q. Do you recall whether or not your company purchased metallized board from any other company?

A. I think there were some purchases made, yes, sir.

Q. From what companies?

A. I can't say definitely. They may have been from both USG and from National, I am not certain.

Q. I direct your attention to the fact that the metallized board license was signed on the 30th of November, 1934. Now subsequent to that time, did you receive 2124 bulletins from USG concerning the price at which this board should be sold?

A. I would say yes.

Q. And can you tell us when the Atlantic Gypsum Products Company started to manufacture board?

A. No, I cannot, I don't remember.

Q. Well, you left the Atlantic Gypsum Products Company in 1936?

A. Yes, sir.

Q. Now had they been manufacturing board for a year, or for two years; before you left the company?

A. I don't remember for how long, Mr. Knuff. I do recollect that they had difficulties in manufacturing.

Q. Difficulties in getting their plant into operation?

A. To manufacture this particular product, yes.

Q. And pending the elimination of those difficulties, did Atlantic Gypsum Products Company purchase board from other licensees?

A. I don't know that they ever did eliminate all of the difficulties.

Q. Well, pending your endeavor to eliminate the difficulties, did Atlantic Gypsum Products Company purchase metallized board from other licensees?

A. It is my recollection that they did, yes, sir.

Q. Can you tell us the approximate quantity that they bought?

2125 A. No.

Q. Now did you have more than one price list that you issued to your salesmen governing the sales of metallized board?

A. Well, if there were any changes in the price, the salesmen were of course advised.

Q. Well, at any one time did you have more than one price list in your salesmen's hands governing the sale price of metallized board?

A. I don't recall.

Q. Did you have a price list for board that you manufactured and another price list for board that was purchased from other companies?

A. I don't recall that we did.

Q. What is your best recollection, that you just had one price list?

A. That would be my recollection.

Q. And that price list was the price that was fixed by the USG bulletins, is that correct?

Mr. BROMLEY. I object to that as calling for a conclusion, and incompetent, and leading.

Justice STEPHENS. Well, it is leading, and it is sustained as leading. I don't quite see the point of your objection that it is a conclusion that this price list they sent out was the USG price list.

2126 Mr. BROMLEY. He said, "was the price that was fixed by the USG bulletins".

Justice STEPHENS. I misunderstood the question.

Mr. BROMLEY. We didn't fix any resale price on board purchased by licensees and the bulletins in effect said so.

Mr. KNUFF. Read the question.

(The pending question was read by the reporter.)

Justice STEPHENS. Well, what I thought you were asking, and the reason I ruled or inquired as I did was that I thought you were asking whether or not this price list that you sent out was the USG bulletin.

Mr. KNUFF. That is what I meant.

Justice STEPHENS. Do you object to that?

Mr. BROMLEY. Not if the question is—was the price list which he sent out our bulletin? I don't object to that.

Justice STEPHENS. The question will be treated as such a question, and the objection is treated as withdrawn.

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. All right.

By Mr. KNUFF.

Q. The prices that you sent out to your salesmen, were they the same as the prices contained in the USG foil board license bulletins?

Mr. BROMLEY. I object to that as incompetent because the bulletins are the best evidence. I don't think he  
2127 can prove it that way.

Mr. KNUFF. I am asking now as to the price lists that he sent out to his salesmen. The bulletins themselves are in evidence, but I am directing the attention of the witness to the prices that he sent to his salesmen, and I am asking him if they were the same as the prices that were contained in the USG bulletins?

Mr. BROMLEY. As to that, the Atlantic Gypsum Products Company price bulletins are the best evidence.

Justice STEPHENS. If the best-evidence rule is invoked, that objection is well taken.

Mr. KNUFF. Here we have on the witness stand, if your Honor pleases, the sales manager of the Atlantic Gypsum Products Company. We are not asking to prove the contents of any specific bulletin—

Justice STEPHENS (interposing). As your question is phrased, you were.

Mr. KNUFF. Not any specific one. I am asking if the prices that he gave to the salesmen were the same as those contained in the price lists furnished under the bulletins of the U. S. Gypsum Company.

Justice STEPHENS. Well, if you are asking either with respect to a specific price list, meaning a document, or all price lists, meaning documents, containing the prices on products, sent out, then they should be produced  
2128 under the best-evidence rule. If you are simply asking this witness whether the company made the same charges as were stated in the USG bulletins, if he knows, that is probably unobjectionable.

Mr. KNUFF. Then I will phrase my question that way.

Justice JACKSON. That is what you want to get at, isn't it?

Mr. KNUFF. Yes, exactly, your Honor.

Justice STEPHENS. Is there any objection to that, Mr. Bromley?

Mr. BROMLEY. No.

Mr. KNUFF. Will you read the Court's question to the witness, please?

(The reporter read the record as follows:

"If you are simply asking this witness whether the company made the same charges as were stated in the USG bulletins, if he knows, that is probably unobjectionable.")

Justice STEPHENS. Do you understand that, Mr. Neale?

The WITNESS. I think so.

I have no recollection of any specific sales lists or charges issued to salesmen at any given time on any product. Therefore I can't say that I have knowledge that they were identical with the U. S. Gypsum Company bulletins.

By Mr. KNUFF.

Q. Did I understand you to say that your salesmen were only given one price list for foil board at any one  
2129 particular time?



A. Well, you mean by that question did they have two prices, and they could sell by either of two prices?

Q. I mean by that, sir, when you were telling your salesmen to sell  $\frac{3}{8}$  inch wallboard of a certain dimension, did they have more than one price that that board could be sold at in any one particular locality?

A. I would say not.

Q. Did your company adhere to the price bulletins that USG furnished you?

Mr. BROMLEY. I object to that unless it is limited to board manufactured by this company.

Mr. KNUFF. No, your Honor, if your Honor pleases, the license agreement that is contained in the complaint under Paragraph IV, at page 112, provides:

"It is expressly understood and agreed that the indivisible and non-exclusive rights, licenses and privileges aforesaid are granted, and they are hereby accepted, upon the express condition that Gypsum Company shall have, and it hereby reserves, the right to determine and fix at any time, and to change from time to time, during the existence of said patents and so long as said rights, licenses and privileges granted hereunder shall continue, the minimum price or prices at which Licensee shall or may sell plaster board having a metallized surface which is covered by said 2130 Roos Patent or any of the said patents set forth in Schedule A", and so forth.

Justice STEPHENS. Well, doesn't this raise the same question—perhaps you are making this examination to amplify and protect your record under your proposed offer of proof—but doesn't this raise the same question or does it not, that the Court ruled on day before yesterday with respect to the issue concerning resale prices of board purchased from each other by the various defendants?

Mr. KNUFF. I don't think it is quite the same question, your Honor. The question that your Honor ruled on the other day was concerning the resale of board manufactured under the so-called Hite and Haggerty patents. This is board that was sold under the metallized bath agreement.

Justice STEPHENS. In other words, the complaint does contain a charge that there was price fixing on metallized board sold by USG to the other defendants?

Mr. KNUFF. Well, the complaint in paragraph 44 definitely charges violation of the Sherman Act—

Justice STEPHENS (interposing). Please answer my question, Mr. Knuff. We all understand that. Does the com-

plaint charge price fixing on the metallized board not manufactured by the various defendants under licenses and sold under those licenses, but upon board purchased by the defendants from each other?

Mr. KNUFF. Under paragraph 44 we think that 2131 it does, but then at the same time there is a provision in paragraph 114, which Mr. Steffen has called to my attention, which reads as follows:

"At the time of the execution of said license agreements" —

Justice STEPHENS (interposing). What page are you reading from?

Mr. KNUFF. Page 29, your Honor.

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers."

So there is that specific paragraph.

Justice STEPHENS. What do you say to that, Mr. Bromley?

Mr. BROMLEY. I have no doubt but what the complaint as to metallized board contains the direct charge that we fixed the price on board that was purchased from us by other licensees. The vice that I find in Mr. Knuff's position is that he picks out the license agreement from which he started to read, on page 112, and is now arguing that that license agreement is illegal, *per se*, on its face, and he is suggesting that its provisions expressly give us the 2132 right to fix the price on board which was purchased from us.

Now this Paragraph IV from which he read does not have the "second parties" point in it. That mistake is not carried into this. His argument is that under paragraph (a) the legal effect of the agreement is to give us the right to fix prices of metallized board sold by licensees regardless of whether they manufactured it or not. But he conveniently overlooks the very next paragraph, paragraph (b), which specifically covers it and says:

"In the event Gypsum Company shall exercise the right thus reserved, namely, to determine and fix at any time, and to change from time to time, such minimum price or

prices, it shall notify Licensee of its election to exercise such right, and shall include in such notice, or accompany such notice by, a statement of such minimum price or prices at which Licensee shall or may sell said plaster board having a metallized surface, manufactured by Licensee, and thereafter shall give Licensee written or telegraphic notice of any change in such price or prices; and Licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly, sell or offer for sale any plaster board having a metallized surface manufactured by said Licensee embodying the inventions and improvements set forth", and so forth.

2133 Now I say that in the face of that explicit provision, and especially in view of the fact that there is no charge in the complaint that the agreement is illegal per se because it attempts to fix resale prices, it is immaterial and improper to make that argument now.

Justice STEPHENS. What puzzles the Court is that we seem now to be arguing about what agreements mean, which is a legal question of interpretation of the agreements, whereas the question is as to whether or not the witness can answer the question. I confess that I am confused about the situation.

Ask the witness the question that you want answered.

Mr. KNUFF. Cannot we take that up after the noon recess?

Justice STEPHENS. I would prefer to have the question explicitly before us so that we can think about it during the noon adjournment.

Mr. KNUFF. Very well.

The prices that you furnished your salesmen, were they the same as the bulletin prices that were contained in the license bulletins of USG?

Mr. BROMLEY. I object—

Justice STEPHENS (interposing). That has already been answered "yes".

Mr. KNUFF. Well, if it has been answered "yes", that is all I want.

Mr. BROMLEY. No, your Honor, it has not been  
2134 answered "yes". I objected to that under the best-evidence rule, and you sustained it.

Justice STEPHENS. You are correct, I am mistaken about that.

Mr. BROMLEY. Then you asked a question which was clearly proper and which I did not object to, and he said he couldn't recall.

Justice STEPHENS. Then there was a question following.

Mr. BROMLEY. Yes. If we could find that question we might reflect upon it over the lunch hour.

Justice STEPHENS. As I understand it, Mr. Bromley, you do concede that the complaint charges that:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers", and so forth.

And yet you seem to argue that because of the second paragraph under IV in the Appendix, paragraph (b), page 112, that no such charge is made.

Mr. BROMLEY. No, I do not, I admit the charge 2135 is made. All I object to is the question which assumes that these prices, so charged, the prices of purchased board, were fixed either in the license agreement or in the price bulletins, because both the license agreement and the price bulletins are perfectly clear that the only prices which were fixed are the prices of metallized board manufactured and sold by the licensees, and these questions constantly assume that the licenses and the bulletins fixed the prices of purchased board, which they did not.

Justice STEPHENS. I see your point. Your contention is that the license agreements speak for themselves and show, so far as the license agreements are concerned, that they fix the prices only upon the board manufactured and sold by the licensee.

Mr. BROMLEY. And that that was true likewise by the bulletins.

Justice STEPHENS. I see your point. Perhaps the question can be looked up during the recess by the reporter, and then we can rule more clearly when we reconvene. I am afraid I haven't been able to understand the reasons for the objection until this moment:

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 1:50 o'clock p.m. of the same day.)



(The trial was resumed at 1:50 o'clock p.m.)

Justice STEPHENS. The Court forgot to inquire, Mrs. Gillette, whether these lost photostats of exhibits which we were discussing at the opening of Court this morning, should by any chance have gotten into the vault?

Mrs. GILLETTEE. There is nothing on our shelf there, your Honor.

Justice STEPHENS. Have counsel on either side of the case been able to discover them during the noon hour?

Mr. BROMLEY. All we have been able to discover is one set of the George M. Brown exhibits which we had understood were given to us for our own use—and nothing else.

Justice STEPHENS. If I may be allowed to relate a personal episode—I was sitting in the Supreme Court room one time, waiting to argue a case in the United States Supreme Court, and another lawyer was on his feet arguing a case and trying to explain two conflicting regulations concerning a War Risk Insurance policy, and was not making much of a job of it. Chief Justice Hughes said, "We still don't understand these regulations; won't you try to make them clearer?"

And counsel said, "Frankly, your Honor, I am confused about them myself."

The Chief Justice said, "Well then, I suppose you submit the confusion to the Court". [Laughter.]

2137 And he, with all the other Judges, laughed.

Now we will reverse the process here, we will submit the confusion to you gentlemen. [Laughter.]

But before doing so, perhaps I can aid a little in clearing it up by stating what seems to us to be the difficulty.

Paragraph 114 of the complaint charges:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U.S.G. well knew, to purchase metallized board from U.S.G. or National for resale to dealers and consumers. Notwithstanding said facts, U.S.G. required its licensees to execute said agreements in order to be enabled to purchase metallized board for resale to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U.S.G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and not-

withstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U.S.G."

That seems to be a charge that there was a price-fixing agreement with respect to the resale price of purchased, as distinguished from manufactured board—and I 2138 am talking about metallized board.

It would seem to the Court that under that charge the Government would have a right to attempt to prove that the prices at which the purchased metallized board was sold, were identical in figures with the prices fixed in the bulletins, and to try to prove that that was as the result of some agreement or understanding.

The defendants, on the contrary, would have a right to try to defend upon the ground that even though the prices were identical they resulted not from an agreement, or price fixing, but from natural business conditions, and necessities, the purchased board and the manufactured board being, we assume, of the same grade.

Now it seems to the Court that probably the objection which is being made to your question, Mr. Knuff, is that it is phrased in a manner which would require the witness to pass upon a question which the Court ought to pass upon, to-wit, the question whether the identical prices, if they were identical, at which the purchased board was sold, with the prices in the bulletins, resulted from business and economic conditions, or from an illegal agreement.

Is that the difficulty?

Mr. BROMLEY. Precisely, your Honor, yes.

Mr. KNUFF. I think, if your Honor pleases, I can clarify this whole situation with just about one or two 2139 questions.

Justice STEPHENS. Thank you.

Mr. KNUFF.. If I may.

Justice STEPHENS. It would seem to the Court that the question which seems now to be particularly in issue: "Did your company adhere to the price bulletins that USG furnished you?" is really asking this witness to pass upon the question as to both purchased board and manufactured board, which the Court ought to pass upon, and that probably the objection ought to be sustained. But the Court wants you to have an opportunity to be heard further if you desire it.

Thereupon, LAURANCE I. NEALE, the witness upon the stand at the time of the taking of the recess, resumed the stand and was examined and testified further as follows:

Direct examination (resumed) by Mr. KNUFF.

Q. Mr. Neale, I show you Government's Exhibit No. 18, which is the metallized board agreement between the United States Gypsum Company and Atlantic Gypsum Products Company, and I direct your attention to page 2 of that agreement, under Paragraph IV, subparagraphs (a) and (b), and I am going to ask you to read that portion that I have indicated. That is Paragraph IV, sections (a) 2140 and (b), and if I may, I will point out to the witness the paragraphs that I have reference to.

Justice STEPHENS. You may do so. Is that on page 112 of the complaint?

Mr. STEFFEN. Page 112, yes.

Justice JACKSON. This one being between USG and Ebsary, though.

Mr. BROMLEY.. It is the same thing.

Justice STEPHENS. Is that the same as Paragraph IV (a) and (b) of the Ebsary agreement?

Mr. KNUFF. Yes, your Honor.

By Mr. KNUFF.

Q. Have you read it, Mr. Neale?

A. Yes.

Q. My question is this—did you sell board manufactured by your company at bulletin prices?

A. I don't remember, Mr. Knuff.

Q. Did you receive any bulletin prices?

A. Presumably.

Q. You say you don't remember whether you sold board manufactured by your company at those prices?

A. I don't remember specific instances.

Q. Well, I am not asking about specific instances. I am asking about your general practice. In the sales of your board did you adhere to the contract that you signed, and sell the board—

2141 A. (Interposing.) So far as I know, we did.

Q. Now did you sell the board that you bought from other manufacturers at bulletin prices also?

Mr. BROMLEY. I object to that question. There were no bulletin prices applicable to that board. Therefore, the question assumes facts not in evidence, and is incompetent.

Mr. KNUFF. My question doesn't assume anything, and if the reporter will please read it—it says, Did your company sell board that you purchased from other companies at bulletin prices?

Mr. BROMLEY. There were no bulletin prices for such board. Therefore it assumes facts not in evidence.

Justice STEPHENS. That objection is well taken, Mr. Knuff. Why don't you ask the witness what the prices were at which he sold the board, and whether the prices at which he sold purchased board were different prices from those at which he sold manufactured board?

Mr. KNUFF. I will ask him that.

Justice STEPHENS. Is there any objection to that?

Mr. BROMLEY. No, sir.

By Mr. KNUFF.

Q. Did you sell purchased board at different prices than you sold the board that you manufactured—and I am referring to the metallized board?

A. I want to answer the question to the best of 2142 my ability, Mr. Knuff.

Q. That is right.

A. But I have no present recollection of prices at any given time on any given product, any more than the man in the moon. There were constantly being sent to salesmen, price lists on various products.

Q. I am not asking you, Mr. Neale, as to specific prices. I am asking you as to policy. Did you have a policy to sell purchased board at a price other than the price that you sold your manufactured metallized board at, or did you have the same policy with respect to both boards?

A. As nearly as I can recall, the price would be the same whether we manufactured the board or purchased it.

Mr. KNUFF. Now if your Honor pleases, we would like to have two or three questions answered by this witness, subject of course to being stricken if the Court sustains the objections to the offer of proof which we will make sometime next week. We recognize that these questions may be within the scope of the Court's ruling of yesterday.

It is our position that the trade and commerce involved in this case, and referred to in paragraph 44 of the complaint, includes all gypsum board and products, whether patented or unpatented, and whether included in the price-fixing clauses of the various licenses and agreements or bulletins, and that hence we may show the actual nature and extent of that commerce.

2143 The reason we want to do it at this time is this.

We don't want to recall Mr. Neale, and as I say, we recognize that this may possibly be within the scope of your Honor's ruling of yesterday, but that can all be taken care



of. If your Honor sustains any objection, of course the answers will be stricken, and if your Honor allows the offer, then of course the answers will be perfectly pertinent and should remain in the record.

Justice STEPHENS. Well, the matter could be handled, I should think, by including within the offer of proof which you will make, the topics upon which you would like to examine this witness, subject to this possibility, that you may have some possible differentiation between those questions and these. If it is for the purpose of protecting your record on that subject, we have no objection to your doing that. Proceed.

Mr. KNUFF. Thank you.

By Mr. KNUFF.

Q. Mr. Neale, did Atlantic Gypsum Products Company also purchase non-metallized board from other companies during 1934, 1935 and 1936?

Mr. BROMLEY. I make the same objection, just for the record.

Justice STEPHENS. The objection may be recorded and the Court will make a ruling later. Answer the question.

2144 The WITNESS. I can't say as to the specific years, but other products were purchased at various times.

By Mr. KNUFF.

Q. Now were these products, that is, board and lath, sold by Atlantic at USG bulletin prices?

Mr. BROMLEY. I would like of course a continuing objection to this line of questioning, but I think this question assumes facts not in evidence. He didn't say they purchased board and lath, as I understand it.

Justice STEPHENS. The witness answered very generally by saying "other products". I thought you were going to ask him if they purchased non-metallized board.

By Mr. KNUFF.

Q. Did your company purchase non-metallized board and lath?

A. I think I recall instances of where we purchased what was called tile board.

Q. And did you purchase regular wallboard, if you recall?

A. I can't definitely recall in this period you are asking about.

Q. And did your company also purchase lath at this time?

A. It may have.

Q. Now the board and lath that your company purchased from USG or other licensees, was that sold at USG bulletin prices?

2145 A. It was sold at the same prices we were getting for our own board.

Q. Now I think just before lunch——

Justice STEPHENS (interposing). Is that all on that subject?

Mr. KNUFF. Yes, those are the questions, your Honor.

Justice STEPHENS. Then, in order that the record may be kept clear, and all at one point so that it is understandable, you can make your objection to those questions now, and the Court will rule on your objection, and leave it to you to make a further full offer of proof.

Mr. BROMLEY. I object to them, on the ground they are immaterial and irrelevant because there is no charge in the complaint covering the subject-matter of the inquiry.

Justice STEPHENS. The objection is sustained.

Mr. BROMLEY. I now move to strike the questions and answers on the same ground.

Justice STEPHENS. They are stricken.

Mr. KNUFF. Will your Honor defer ruling on that motion to strike until after we make the offer? I am just trying to look at the mechanics of the situation.

Justice STEPHENS. Well, there is no objection to deferring the ruling on the motion to strike until you make your offer, although I don't think, in the usual course of appellate practice, that you are harmed in any manner because when you make the reoffer you really are putting the same question before the Court again, and the Court is again ruling against you, so that you have two rulings rather than one. However, if you wish to have the ruling deferred on the motion to strike, there is no objection to that. The answers may stand until the offer of proof is made.

Will the reporter make a note in the index as to the pages of the record where these questions and answers appear, so we will know where they are?

It is better to have rulings on questions appear where the questions are, so far as possible, Mr. Knuff.

And while we are interrupted I would like to call the court reporter's attention to the fact—I should have done this earlier—that my secretary informs me that the page

numbers in the transcript jump from page 1396 to 1398, there being no page 1397. The continuity of the text appears coherent; and it is probably only an error in page numbering, but you had better make a check as to that, and a correction, so that it will not confuse some reader of the record later.

The REPORTER. Your Honor, that was discovered and checked back by the reporter with his notes, and it is just an error in page numbering. There is no page 1397.

A similar situation occurs with respect to the transcript of December 13, where the numbering skips from page 1976 to 1978, and in this instance also it was merely an error in page numbering and the continuity has been checked by the reporter with his notes.

By Mr. KNUFF.

Q. I show you, Mr. Neale, Government's Exhibit 292, the same being a memorandum, dated December 3, 1934, to L. I. Neale, from C. A. Warren, and signed—I presume that is C. A. Warren's signature there? Will you look at it, please?

A. Yes, sir.

Q. Is that Mr. Warren's signature?

● A. As I recall it.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 292.

Justice STEPHENS. Is there any objection except the usual objection?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation as to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 292 was received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 293, the same being a memorandum, dated December 5, 1934, to R. H. Hollowell, from

2148 L. I. Neale on the subject, "aluminum covered gypsum lath", and signed by L. I. Neale. Would you please look at that?

A. Yes, sir.

Q. Is that your signature?

A. Those are my initials.

Q. You will notice in the second sentence that you state that you will not be in a position to manufacture this

product for some little time, and that you have made arrangements with USG for the purchase of aluminum covered gypsum lath, and have ordered a car shipped from Oakfield to your Portsmouth plant. Do you recall those arrangements?

A. No, I don't sir.

Q. You stated before the noon recess, I believe, that you were never able to manufacture this board without some imperfections in it. Do you recall that testimony?

A. Yes, sir.

Q. Were you ever able to produce aluminum covered board, while you were with the company, that went beyond the experimental stage?

A. I think I can recall seeing some board of our manufacture. Whether you would call it in the experimental stage or not, I don't know.

Q. You think you saw some?

A. Yes.

Q. I show you—

Justice STEPHENS (interposing). Is Exhibit 293 offered?

2149 Mr. KNUFF. I have not offered it, no, your Honor. Thank you for calling it to my attention. We now offer Government's Exhibit 293.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Exhibit 293 is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 293 was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 294, the same being a signed carbon of a letter, dated December 10, 1934, addressed to Mr. C. F. Henning, vice president, and signed by the Atlantic Gypsum Products Co., Inc., L. I. Neale, vice president.

A. Yes, sir.

Q. That is your signature, or your initials—which are they?

A. My initials, yes.

Q. And do you recognize your initials, sir?

A. Yes, sir.

Mr. KNUFF. We now offer in evidence Government's Exhibit 294.

Mr. BROMLEY. The usual objection.



2150 Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 294 was received in evidence.)

By Mr. KNUFF.

Q. I show you, Mr. Neale, what has been marked for identification as Government's Exhibit 295, the same being the original of a letter dated November 27, 1935, addressed to L. I. Neale, V. P., and signed, United States Gypsum Company, H. F. Sadler, assistant general sales manager.

Will you please state whether or not that letter was received by you?

A. I don't recall the letter, but it bears all the earmarks of having been duly received.

Q. It bears on its face the receiving stamp of the Atlantic Gypsum Products Company's New York office, does it not?

A. It does.

Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibit 295.

Mr. BROMLEY. Just the usual objection.

Justice STEPHENS. The letter is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2151 (The document marked as Government's Exhibit No. 295 was received in evidence.)

By Mr. KNUFF.

Q. Just above your name, Mr. Neale, you will notice that there is some small writing in pencil. Do you recognize the handwriting there?

A. No, I do not.

Q. It is not your handwriting?

A. No, that is not my handwriting.

Q. And you don't recognize that?

A. No.

Q. Do you recall, Mr. Neale, ever having attended a conference of licensees on March 11, 1936, called by Mr. Henning, at which Mr. Henning; Mr. Sadler; yourself; Mr. Black of American Gypsum Company; Mr. Burley of National; Mr. Price, one of the attorneys for USG; and Mr. Van Hagan and Mr. Henley of Certain-teed, attended.

A. I don't recall such a meeting.

Q. At which perforated gypsum lath was discussed—do you recall that?

A. No, I don't.

Q. I show you now, sir, what has been marked for identification as Government's Exhibit No. 296, and I want you to look at it and see if that refreshes your recollection.

2152 A. Do you want me to read all of it?

Q. I want you to read it, and see if it refreshes your recollection.

A. Yes, sir.

Q. Has your memory been refreshed concerning any of the items mentioned in this memorandum?

A. Frankly, no.

Mr. ADAMS. I object to that, your Honor. The question should be addressed to him to elicit a fact, and not as to whether he is refreshed as to something mentioned in some memorandum.

Justice STEPHENS. Well, he has answered "no".

Mr. ADAMS. I didn't hear him answer.

By Mr. KNUFF.

Q. After reading this memorandum, your answer is that you are not refreshed as to any of the items mentioned therein?

Mr. ADAMS. I make an objection now.

Justice STEPHENS. The objection is technically well taken, Mr. Knuff. You should first ask the witness whether he remembers any particular fact in respect of which the Government wishes to inquire under the issues, and then ask him if this refreshes his recollection on it. The objection is sustained.

By Mr. KNUFF.

2153 Q. I show you, sir, what has been marked for identification as Government's Exhibit 297, the same being a carbon copy of a letter dated March 16, 1936, addressed to L. I. Neale, vice president, and signed National Gypsum Company—vice president, and then over on the left-hand side of the second page there are typed in the words "R. F. Burley: MM".

A. Yes, sir.

Q. Are you familiar with the subject-matter of the letter, Mr. Neale?

A. In a general sort of way.

Q. Do you know who wrote the name "R. F. Burley" on the first page of that letter?

A. I don't recognize the handwriting, no.

Q. You knew Mr. Burley, did you?

A. Yes, sir.

Q. Did you correspond with him in a business way?

A. Yes.

Q. And you say that you recognize the subject-matter of the letter?

A. Yes.

Q. Do you know whether or not you had any correspondence with Mr. Burley on the subject of perforated lath at about this time?

A. I shouldn't have known of this if you hadn't put it before me.

Q. You have no recollection?

2154 A. No.

Q. Was your company at that time contemplating taking out a perforated lath license agreement with United States Gypsum?

A. I think the matter was under consideration.

Q. And did you discuss that agreement with any person else, if you recall?

A. I can remember discussing it with Mr. Fuller.

Q. When was that?

A. I can't say.

Q. Was it on or about the time of the date of this letter?

A. I wouldn't be able to guess, Mr. Knuff, I don't know whether it was in that year or in the preceding year.

Q. You left the company in 1936?

A. Yes, sir.

Q. What month in 1936?

A. The first of July.

Q. And this letter is dated March 16, just three months before you left?

A. Yes.

Q. Can you recall any discussion with Mr. Fuller on perforated lath shortly before you left the company?

A. I would say sometime within the preceding six or nine months.

Q. What discussion did you have with him, please?

2155 A. As to whether it was advisable to become licensees under the patent.

Q. And what was your position with respect to whether or not it would be desirable to become licensees under the patent?

A. I think it was questionable.

Q. Why was your position questionable? Do you mean your position was questionable?

A. I mean it was questionable whether it was desirable to do so.

Q. Why did you consider it questionable to take out this licensing agreement on the perforated lath?

A. As I recall it, there was some doubt in our mind if the patent covered the matter of perforations.

Q. You mean there was some doubt as to whether or not the patent was valid?

A. Well, I don't know that I would put it just that way, sir.

Q. How would you put it?

A. Just as I did, whether the patent covered the matter of perforation fully, so that the board could not be perforated except in the manner indicated by the patent.

Q. I don't know as I understand your position. There was some doubt as to whether or not—will you read the answer, Mr. Reporter?

2156 (Thereupon, the last answer of the witness was read by the reporter.)

By Mr. KNUFF.

Q. Was it your position that another board could be manufactured without infringing the USG perforated lath patent?

A. As I recall it, we considered that possibility.

Q. And what was your position on that?

A. I don't recall.

Q. You did canvass that possibility with Mr. Fuller?

A. We discussed it, yes, sir.

Q. On one occasion, or on more than one occasion?

A. I don't remember.

Q. And do you know whether or not your company ever did take out a license under the perforated lath agreement?

A. I—

Mr. BROMLEY (interposing). We will stipulate that it did not, Mr. Knuff.

By Mr. KNUFF.

Q. Did you ever discuss this same question with any person other than Mr. Fuller?

A. I don't recall any such discussion. There may have been such, but I don't recall it now.

Q. The only thing that you can recall is the discussion with Mr. Fuller?

A. Yes.



2157 Q. Were you advised by anyone that another board containing perforations could be made without infringing the perforated lath patent of USG?

A. Evidently I was, as is indicated by this letter addressed to me.

Q. I mean when you were talking with Mr. Fuller?

Mr. BROMLEY. Just a moment. May that answer be stricken? He misapprehended the question, as I understand it.

Justice STEPHENS. Read the question and answer.

(Thereupon, the portion of the record indicated was read by the reporter.)

Justice STEPHENS. The Court does not see the force of the objection, Mr. Bromley.

Mr. BROMLEY. He is answering from the letter. He has already told us that he remembers nothing about anything talked about in the letter.

Justice STEPHENS. Well, of course you are expected to answer, Mr. Neale—I assume you understand—from your own recollection, refreshed by the letter if it does refresh it. If you have no recollection of being advised by anyone except as indicated in the letter, then you should say that.

The WITNESS. That would be my answer, then.

By Mr. KNUFF.

Q. You haven't any recollection, then, of being advised by anyone that the board could be made without  
2158 infringing the USG patent?

A. No.

Q. Although that was the position you did take when you were talking with Mr. Fuller.

A. That was one of the matters discussed with me as to whether or not the board could be made——

Q. (Interposing.) Now you say that was one of the matters discussed with him. That implies that there were other matters along the same lines that were discussed with him, is that correct?

A. There may have been, I don't know.

Q. Do you recall any other discussions that you had with Mr. Fuller?

A. No, sir, I don't.

Q. The only thing that you can recall that you discussed with Mr. Fuller was the fact that a board might be made with perforations that did not infringe the USG patent?

A. I do recall discussing that particular point with him.

Q. Up until the time that you severed your connections with the Atlantic Gypsum Products Company do you recall that the question of becoming a licensee with USG was ever considered?

A. You mean on this perforated lath?

Q. Correct, on the perforated lath.

A. Well, the discussions with Mr. Fuller to which  
2159 I have just referred, had to do with that possibility.

Q. Now did you have before you the proposed form of contract?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Do you recall whether or not in the proposed form of contract USG reserved the right to fix prices on perforated gypsum lath?

A. I don't recall seeing any proposed contract on this subject.

Mr. KNUFF. I offer in evidence Government's Exhibit 297.

Mr. BROMLEY. Objected to on the ground that there is no proper foundation because no identification.

Mr. FINCK. If the Court please; I would like to record our objection on behalf of National to this exhibit as being immaterial. National did not have a perforated lath agreement with USG, and all the matter contained in this letter refers to perforated lath, I believe.

Mr. KNUFF. Mr. Finck, was this letter, Government's Exhibit No. 297, obtained from the files of the National Gypsum Company?

Mr. FINCK. I believe it was.

Mr. KNUFF. Here we have a situation, your Honor, where the witness was familiar with the subject-  
2160 matter of the contents of the letter; the letter was addressed to the witness who at that time was the vice president of the Atlantic Gypsum Products Company. This is a carbon copy of a letter, and it bears upon the second page thereof in typewriting the name, "R. F. Burley", who at that time was connected with the National Gypsum Company; and as I say, it was obtained from the files, and admittedly obtained from the files, of the National Gypsum Company.

I think the letter is circumstantially identified.

Justice JACKSON. What does "Enc" indicate, right over the name?

Mr. KNUFF. An enclosure.

Justice JACKSON. Is that an enclosure to Burley or by Burley, or what?

Mr. KNUFF. I don't know.

Justice JACKSON. That is why I am asking the question.

Mr. KNUFF. In our correspondence we put, "Enc" at the bottom of a letter as meaning that we are enclosing something.

Justice JACKSON. But there is nothing in this letter to indicate that anything went with it.

Mr. KNUFF. That is right; I don't know what it means.

Justice STEPHENS. What do you say with respect to Mr. Finck's objection that it is not material, National never having taken out a license for perforated lath with USG, and this letter being a discussion of a perforated lath program?

2161 Mr. KNUFF. That is true, that National never did take out a license, as we understand it, for the perforated lath. Nevertheless, we think it is quite material and quite appropriate to have this letter considered, because it would tend to show at least the scope of the knowledge of the invalidity of the patent that the trade had at that time.

Justice STEPHENS. Well, as to National, if National never took out a license there would be no point in attempting to prove that it took one out in bad faith or as a subterfuge.

Mr. KNUFF. We are not offering it for that purpose to show that National took one out at all, because we know that National did not take one out.

Mr. BRIMLEY. In that connection, paragraph 119 of the complaint, I see somewhat belatedly, does not mention any charge either against National or Atlantic. So neither side of this letter has anything to do with the charges in the complaint about perforated lath, neither Atlantic nor National.

Mr. KNUFF. I think we can clarify that by saying that we concede that National did not take out a license to manufacture under the perforated lath patent, and neither did Atlantic take out a license. Nevertheless, here are two companies which did not take out a license but which knew about—or felt or considered that the patent was invalid.

Justice GARRETT. We aren't trying the invalidity of the patents here, are we? I thought we had gotten beyond that as far as this Court is concerned. If you are introducing it on the ground of somebody thinking it was invalid, what relevancy has it now in the state that the issues are?

Mr. KNUFF. We are not introducing it for that purpose, we are introducing it for the purpose of showing that the license agreements were not entered into in good faith but were mere subterfuges in order to control the price of the perforated board, not for the purpose of showing the invalidity of the patent.

Justice STEPHENS. Well, the Court has already ruled that you are entitled to show, if you can, that such license agreements as were entered into, were entered into as a subterfuge or as a cloak for a price fixing scheme as charged in the complaint, but here you apparently attempt to prove that USG and others entered into perforated lath agreements as a subterfuge by showing that Atlantic and National did not enter into any such agreements at all.

Mr. KNUFF. That is right.

Justice STEPHENS. It would seem to me highly remote, if material at all, and we think also that the letter has not been identified. This bears no receipt stamp, it is not identified by Mr. Neale, he doesn't remember receiving it. It isn't related to some other exhibit. The objections are sustained.

Mr. JOHNSTON. If the Court please, I would like 2163 to have the same objection there on behalf of Texas, the same objection as Mr. Finck makes, because we did not have a perforated lath license either.

Justice STEPHENS. Objection sustained as to Texas also.

By Mr. KNUFF.

Q. I show you, Mr. Neale, what has been marked for identification as Government's Exhibit 298, the same being a memorandum dated March 23, 1936, addressed to W. P. Fuller by L. I. Neale on the subject of "Neat Plaster in Metropolitan New York", and marked on the top thereof, "Confidential", and signed on page 4, "Atlantic Gypsum Products Company, Inc.—L. I. Neale, vice president". Will you please read that exhibit?

A. Yes, sir.

Q. Are you familiar with the subject-matter of the memorandum?

A. In a general sort of way.

Q. And the subject-matter is something that would normally come to your attention as vice president of the company, is that correct?

A. Yes, sir.

Q. And is the memorandum written in the usual form that your company adopted for inter-office communications?



A. This is a carbon copy that I have here, it is not on the office form.

2164 Justice STEPHENS. You say it is not on the office form?

The WITNESS. That is right.

2165 Mr. KNUFF. You mean by that that it is not on the original of the office form?

The WITNESS. Yes.

Mr. KNUFF. Would you show the witness Government's Exhibit 289, please?

(Exhibit No. 289 handed to the witness.)

Justice STEPHENS. Is that in this same set?

Mr. KNUFF. Yes, Your Honor, it is a letter of September 6, 1934.

By Mr. KNUFF.

Q. Do you have before you Exhibit 289?

A. Yes.

Q. You will notice that the original contains at the top of it the word "Memorandum".

A. Yes.

Q. And then on the left-hand side of the page, at the top, is printed thereon the word "To". Do you notice that?

A. Yes.

Q. That indicates the person that is to receive the letter?

A. Yes.

Q. And the next word is "From", indicating the person who wrote the letter?

A. Yes, sir.

2166 Q. And then "Subject" is the third sub-head on the original of the form?

A. Yes.

Q. Now does this conform to the form of the original?

A. It conforms to the form of the original, yes.

Q. And you are acquainted with the subject matter, you say, in a general way?

A. Yes.

Q. Now you will notice on the last page of the memorandum, on the bottom, in the left-hand corner, the word or initials, I am not sure which, "LIN:M"?

A. Yes.

Q. "LIN", I take it, are your initials?

A. Yes, sir.

Q. And the "M" is the stenographer or the typist who wrote the letter, is that your understanding?

A. I think I see "MK" on this copy.

Q. Well, it is just "M" on the photostat that I have before me. You say it is "MK" on your copy?

A. Yes.

Justice STEPHENS. The "K" shows on this photostat.

By Mr. KNUFF.

Q. Does that indicate who the typist was?

A. I can't say. The woman who was my secretary for many years, about a year before this got married, and I had a series of girls in this period. I can't say positively.

2167. Q. Is there any doubt in your mind that you dictated this memorandum?

A. I think in all probability I did.

Mr. KNUFF. We offer in evidence Government's Exhibit 298.

Mr. BROMLEY. I object to it on the ground that it is immaterial. I don't understand the purpose of it.

Justice STEPHENS. What is it offered to prove?

Mr. KNUFF. Fixing the prices of plaster.

Mr. BROMLEY. The only charges in the complaint in connection with fixing the prices of plaster are contained in paragraph 77(b) on page 18, and are in connection with the license agreements, the allegation being:

"In addition to the agreements contained in the afore-said license agreements, U. S. G. and its licensees mutually agreed among themselves as follows:

"(b) U. S. G. would advance and stabilize the prices for board immediately after the execution of said license agreements. As prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products."

That is repeated in connection with the November licenses in paragraph—no, it is not repeated. I guess that is the only place. As I understand it, there is no other charge about plaster prices.

2168 Justice STEPHENS. Why isn't the exhibit material under that charge, Mr. Bromley?

Mr. BROMLEY. Well, because the exhibit on its face, being dated in 1936, can have no relationship, it seems to me, to a charge that—

Justice STEPHENS (interposing). I thought you were objecting to the immateriality of the contents rather than the date.

Mr. BROMLEY. Yes, I was, sir, but I was trying to demonstrate that it is on its face immaterial, because it is

dated in 1936 and hasn't anything to do with any agreements that were entered into in connection with the licenses. It might be that it had some relevancy as to a separate little conspiracy between USG and Mr. Neale, covering metropolitan prices of plaster, in 1936. Possibly it could have been attacked in some proceeding. But it has not been attacked.

Mr. KNUFF. If Your Honor please, in order to get before you clearly the Government's contention, the charging portion of this complaint is paragraph 44. So that is the portion of the complaint which the Government relies upon to show the violation of the Sherman Act, and we set forth in paragraph 44 that the defendants have been parties to contracts in restraint of trade.

We have also set forth in paragraph 44 that the defendants have been engaged for many years past in a 2169 continuing conspiracy. Now if the Court desires to have pointed out an overt act, and that is all that the subject matter of this memorandum is, an overt act pursuant to the conspiracy set forth in paragraph 44, I think we have clearly set forth the overt act on page 26, where we say: "From time to time during said period, U. S. G. and its licensees have by concerted action controlled the prices and methods of distribution of plaster and miscellaneous gypsum products sold by U. S. G. and its licensees \* \* \*"

That is in paragraph 96. But paragraph 96 is only a charge of an overt act. The conspiracy is set forth in paragraph 44 of the complaint.

Justice STEPHENS. Well, of course, Mr. Knuff, you can't quite hope to rest purely on paragraph 44, because that was so broadly phrased that it would include every act from the beginning of the world until the end of time; and the Court, in making its rulings with respect to the materiality of offered proof, has to consider the rest of the complaint.

However, it seems to us, Mr. Bromley, in view of the allegations of paragraph 77(b), and the one just referred to by Mr. Knuff, paragraph 96, that possibly this may have some materiality.

Mr. FINCK. If the Court please, I would like to record an objection on behalf of National Gypsum Company, however, on the ground that this offered exhibit is im-  
2170 material as to National. There is absolutely nothing to connect National Gypsum Company with any plaster price conspiracy mentioned in this document, and

it seems to me that if it goes in as relating to National, it is a very prejudicial document.

Justice STEPHENS. Do you claim that it is relevant as to National?

Mr. KNUFF. We claim that it is relevant as a declaration of a co-conspirator.

Mr. FINCK. We may have been a co-conspirator in one conspiracy and not in another. This seems to be, as Mr. Bromley says, a little conspiracy all of its own, which we certainly were not connected with.

Justice STEPHENS. Well, we think it is admissible in evidence. It may have some materiality. It is received, subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as "Government's Exhibit No. 298", was received in evidence.)

By Mr. KNUFF.

Q. Mr. Neale, I notice on the bottom of page 1 of Exhibit 298, the initials "C. F. H." Will you indicate who you were referring to by those initials? I think I know, but I want the record to show it.

A. I would say Mr. Henning.

2171 Q. He was connected with what company?

A. United States Gypsum Company.

Q. And wherever, in this exhibit, the initials "C. F. H." appear, you want it understood that they refer to C. F. Henning of the United States Gypsum Company, is that correct?

A. I believe that would be a proper inference.

Q. I notice you use "Ebsary" on page 2. By that do you mean Mr. Fred Ebsary of the Ebsary Gypsum Company?

A. I don't know whether I meant the individual or the company.

Q. You meant one or the other?

A. Yes.

Mr. KNUFF. You may cross-examine the witness.

Justice STEPHENS. We will take the afternoon recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed, Mr. Bromley.

#### CROSS EXAMINATION

Mr. BROMLEY. If it please the Court.

By Mr. BROMLEY.



Q. Mr. Neale, early in your testimony this morning you said, as I understood you, that your company adhered to the general license bulletin prices, so far as it was able to.

Do you recall that?

2172 A. Yes, sir.

Q. Isn't it a fact that by that answer, you intended that adherence to extend only to such board as was manufactured by your company under the patents licensed to it?

A. Well, naturally.

Q. You also referred to meetings of licensees and licensor. Isn't it a fact that such meetings as were held were held at irregular rather than regular times?

A. I should say so.

Q. There was no regular schedule of licensee meetings ever, while you were in the business, was there?

A. Not that I recall.

Q. You also said that Board Survey Company was a company which sought to see whether the license was being complied with. Did you mean by that whether the licensees were observing the minimum prices fixed on the patented board manufactured by them?

A. I think it covered all matters contained in the license agreement.

Q. But in its efforts to secure compliance, those efforts were limited to discussion of provisions of the license with respect to patented products, were they not?

A. Yes.

Q. With respect to metallized board, Mr. Neale, it is the fact, isn't it, that your company, at the time it  
2173 took the license, intended to manufacture the patented product?

A. Yes, sir.

Q. In connection with metallized board, and in your answers to questions with respect to the board which you purchased, you said, as I understood you, that the price would be the same, of the board that you sold, whether you made it or purchased it. Another way to express that, Mr. Neale, would be that you sold the board that you purchased, the metallized board, at the same prices as you sold the metallized board that you manufactured; isn't that right?

A. Yes.

Q. Now what can you say as to whether or not that was a price policy which you arrived at independently of any competitor?

A. I don't see how a company that was manufacturing or expecting to manufacture a product could, at various intervals, put out a similar product at a different price.

Q. And so it is the fact, isn't it, sir, that you determined, independently of any competitor, to charge the same price for purchased as you charged for manufactured metallized board?

A. I remember having no conference with anyone on that subject.

Q. And that policy which you pursued was not the result of any understanding to that effect which you  
2174 had with USG or anybody else, was it?

A. I don't recall, as I just said, any conference on the subject.

Mr. BROMLEY. Will you hand the witness Exhibit 279, please?

(Exhibit 279 handed to the witness.)

By Mr. BROMLEY.

Q. This letter to Mr. Avery of May 24, 1927, refers to "seconds". Isn't it a fact, Mr. Neale, that after your company developed its new plant and its production, that the seconds problem took care of itself in that fewer and fewer resulted from your manufacture?

A. As we improved in the art of manufacturing, naturally there were fewer seconds.

Q. And isn't it the fact that at all times, from the date of this letter forward, you sold such seconds as resulted from your production without any restriction whatsoever?

A. As far as I can recall.

Q. And isn't it a fact that you never had any agreement or understanding with Mr. Avery, USG or anyone else, with respect to whether or not you should sell seconds?

A. I don't recall any.

Q. Will you refer, please, to Exhibit 282. In your letter to Mr. Baker of July 22, 1929, which is Exhibit  
2175 282, isn't the reference in the last paragraph merely to a proposed meeting for the purpose of exchanging ideas on the proposed form of contract?

A. I would think so.

Q. It is a fact, isn't it, that at the meeting which was referred to in that paragraph, you had your lawyer with you?

A. I don't recall the meeting.

Q. Well, look at the second paragraph. Doesn't that refresh your recollection that at that time Mr. Channing, your lawyer, was probably with you?

A. I am sorry, but I don't remember the meeting. I don't know that it ever took place.

Q. Mr. Channing was your lawyer, wasn't he?

A. Yes, sir.

Q. Now you had nothing to do with the negotiation of either the May, 1929, or the November, 1929, license, did you, sir.

A. No, sir.

Q. Will you look at Exhibit 285, please.

A. Yes, sir.

Q. The Structural Gypsum Corporation, mentioned in the last line of that letter, was a plaster manufacturer which did not manufacture either wall or plaster board, isn't that right?

2176 A. That is my recollection.

Q. And you were a witness in the recent criminal case against the gypsum industry here in Washington, were you not, sir.

A. Yes.

Q. And you know that in that case, the Structural Gypsum Corporation, and other plaster manufacturers like it, were called "manufacturing distributors"?

A. I don't have any recollection of it.

Q. Did you know that they were called "manufacturing distributors" in the industry while you were in it?

A. Frankly, I don't recall the term.

Q. But there were a half a dozen or so companies like the Structural Gypsum Corporation and the Oakfield Company, which were plaster manufacturers but which did not manufacture either wall or plaster board, were there not?

A. There were a number of companies that did not manufacture a full line of products.

Q. And some or all of those companies purchased the board in order to fill out their line to satisfy customer demand, is that right?

A. That is true.

Q. And Structural Gypsum Corporation, referred to in Exhibit 285, was such a company?

A. Yes.

2177 Q. Did you ever receive a reply from Mr. Henning to the inquiry contained in this letter, Exhibit 285?

A. I don't recall.

Q. I show you what purports to be such a reply.

Mr. BROMLEY. Mr. Knuff, have you located, as yet, the letter?

Mr. KNUFF. I haven't even looked for it as yet, because I haven't been out of the building.

Mr. BROMLEY. It was Defendants' Exhibit 6 in the criminal case, to aid you in your search.

(A document was handed to the witness.)

Mr. KNUFF. May it please the Court, I don't know what the witness has in front of him, yet. We haven't been furnished any copies of it, and I think reciprocity ought to work both ways.

Justice STEPHENS. Will you hand a copy to Government counsel?

Mr. BROMLEY. Yes, sir.

(Copy handed to Mr. Knuff.)

By Mr. BROMLEY.

Q. Now isn't it a fact, Mr. Neale, that in answer to your letter, Exhibit 285, you were advised by Mr. Henning that price control did not apply to resales of gypsum board?

A. It is so stated in this letter.

Q. And isn't it a fact, Mr. Neale, that neither 2178 you nor your company, so far as you know, was ever a party to any understanding or agreement, at licensee meetings or otherwise, or ever a part of any conspiracy to control the resale prices of distributors?

A. I recall of no effort to do that.

Mr. KNUFF. If Your Honor pleases, the question is objected to because it asks for a conclusion concerning a conspiracy, and we ask that the answer first be stricken from the record until there is a ruling made by the Court.

Justice STEPHENS. Well, the question is objectionable in that one particular, Mr. Bromley. I think that it asks the witness to tell whether or not they were parties to a conspiracy. You are entitled to ask whether or not they were parties to any understanding or effort or agreement.

Mr. BROMLEY. Yes, sir—

Mr. KNUFF (interposing). May the previous answer be stricken?

Justice STEPHENS. It may be.

By Mr. BROMLEY.

Q. Were you ever a party, Mr. Neale, or your company, to your knowledge, to any understanding or agreement to control the resale prices of distributors?

A. No.

Mr. BROMLEY. May we have Exhibit 286, please?

(Exhibit No. 286 was handed to the witness.)



2179 Mr. BROMLEY. I ask that the exhibit to which I have just referred be marked Defendants' Exhibit 6 for Identification, that is, Mr. Henning's reply to Exhibit 285, which is Mr. Henning's letter to Mr. Neale of May 12, 1932.

(The document referred to was marked as Defendants' Exhibit No. 6 for Identification.)

Mr. BROMLEY. It is a coincidence that that letter is marked in this trial Defendants' Exhibit 6 for Identification, and was marked the same way, with the same number, in the criminal trial.

Justice STEPHENS. Are you offering it?

Mr. BROMLEY. Not at this time, sir.

By Mr. BROMLEY.

Q. Do you have Exhibit 286 before you, Government's Exhibit 286, your memorandum to Mr. Fuller of March 30, 1933, Mr. Neale?

A. Yes.

Q. Now you have told us, have you not, that F. B. Lawton, Inc., and Tomkins-Rockwall Corporation were merely selling agents of the Atlantic Company?

A. Yes.

Q. At this time, the licensor's license bulletins contained a prohibition against the licensee compensating its salesmen through commissions. Do you remember that?

2180 A. I think I do, yes.

Q. So that if F. B. Lawton, Inc., and Tomkins-Rockwall Corporation were your selling agents, you had no right to pay them commissions, under the provisions of the price bulletins issued under your license; isn't that right?

A. If it is as you have stated. I don't remember the details of those contracts.

Q. And is not that what Mr. Henning asked you about, that is to say, what you were doing about your selling agents, the Lawton Company and Tomkins-Rockwall Corporation?

A. As I recall it, somebody had made complaints about this man Fleming, as to how he was remunerated, and it had to do with that matter, he being an employee of F. B. Lawton, Inc.

Q. Now in the fourth paragraph of Exhibit 286, I call your attention to the first sentence: "The licensor feels . . .", and so forth. Can you tell me whether that was something that was told you at the meeting referred to in

Exhibit 286, or whether that was something which you concluded yourself?

A. I can't remember.

Q. Will you please direct your attention to the second sentence: "This seems to me to be fair for it would be foolish \* \* \*", and so forth. Can you tell us whether or not that was your own conclusion, or was something that

Mr. Henning or somebody else told you?

2081 A. Obviously that would be my own conclusion:

Q. Now isn't it a fact, sir, at the time you wrote Exhibit 286, it was your impression that Structural and Oakfield, like Lawton and Tomkins-Rockwall, were selling agents?

A. I think in all probability it must have been, from the way the letter reads.

Q. And you knew, of course, at that time, did you not, sir, that the licensor had no right to fix the resale prices of these plaster manufacturers if they bought the board instead of being selling agents?

A. If they were purchasers of the board and owned it in their own right, yes.

Q. If they were selling agents, then you felt that the right of price control extended to their activities, because they were, in effect, employees of a licensee; is that right?

A. Yes.

Mr. BROMLEY. May we have Exhibit No. 289, please?

(Exhibit No. 289 handed to the witness.)

By Mr. BROMLEY.

Q. Exhibit 289 is Mr. Fuller's memorandum to you of September 6, 1934, sir.

It is a fact, isn't it, that at this time, the new product, insulation board, was cutting in on plain gypsum  
2182 board sales?

A. You mean the metallized board?

Q. No, sir, I was talking about insulating products made by others.

A. Yes, it was a competitor of gypsum board.

Q. There was commencing to be made at this time a product known as insulation board, wasn't there?

A. Well, I think it had been made previous to this time.

Q. And that product was cutting into the sales of wall board and plaster board made by USG and other members of the gypsum industry, was it not?

A. It was a strong competitor.

Q. And it was for the purpose of meeting the competition from this new insulation board that the metallized board was developed by USG, was it not?

Mr. KNUFF. Please don't answer that question yet.

If Your Honor please, we object to this line of cross-examination for the reason that in the examination-in-chief, we have not said anything about any insulation board at all. It therefore is going far beyond the scope of the examination-in-chief.

Justice STEPHENS. We think the objection is not well taken, that the direct-examination went into a discussion, through this exhibit, concerning the taking of a  
2183 metallized board license and the reasons why it was taken. It would therefore seem to be proper cross-examination, as to why those discussions were held, at any rate.

Mr. KNUFF. I would say that that would be a matter for defense, that it would be proper for the defendant to use in his case-in-chief, but we have certainly not asked this witness a single question—and my memory is very clear—concerning insulating board.

Now if Mr. Bromley wants to make this witness his own witness in that respect, I haven't any objection. But I am objecting to him cross-examining on something that we have not covered at all by your examination-in-chief.

Justice STEPHENS. The mere fact that counsel, on direct-examination, does not mention particular words, to-wit, "insulation board", doesn't necessarily exclude it from a line of cross-examination if the subject is sufficiently related to the direct-examination to make it a subject which is proper to inquire into to explain the direct-examination.

The objection is overruled.

Mr. KNUFF. In connection with this exhibit, I didn't ask this witness anything except as to the identification of the exhibit.

Justice STEPHENS. Didn't you offer it in evidence?

Mr. KNUFF. Yes, but I didn't ask him any questions on it.

2184 Justice STEPHENS. Well, if it is in evidence, it is a part of the direct-examination.

Mr. KNUFF. I thought Your Honor understood that I questioned the witness in connection with this exhibit, and all I did was question him in connection with the identification, and after I established that I offered it in evidence.

Justice STEPHENS. But you rely on the exhibit for all that it is worth in the case, under your pleadings, do you not?

Mr. KNUFF. We certainly do, Your Honor.

Justice STEPHENS. Then counsel are entitled to cross-examine the witness on the subject of this exhibit, which he has identified as a communication between himself and Mr. Fuller. The witness has given authenticity to this exhibit and to its contents, and therefore counsel can not be forbidden to cross-examine on it.

We are agreed that the objection is not well taken. Objection overruled.

By Mr. BROMLEY.

Q. Mr. Neale, the application of this aluminum foil to one side of ordinary gypsum plasterboard or wallboard converted that wallboard into board having qualities of insulation, did it not?

A. It added to the insulation value, yes.

Q. And that was because the aluminum foil, being  
2185 shiny and reflective, would reflect cold and heat, and retard its penetration; isn't that right?

A. Yes.

Q. Now isn't it a fact that Mr. Henning, of the USG Company, during this period was anxious for all companies in the industry to get behind this product in order that the increasing competitive threat of other insulating boards could be repelled?

A. I don't know what were Mr. Henning's motives. It would be a reason for our wanting to make reflective board.

Q. Don't you recall that that was the reason that Mr. Henning wanted to get as many members of the industry as possible behind this product, because he felt that it ought to be energetically pushed in order to meet the competition of insulating board?

A. I think I have answered that, Mr. Bromley. I don't know what was in Mr. Henning's mind, but I know that we felt it was desirable for us to get into it.

Q. Well, as a matter of fact, the brunt of the promotional work in this field was borne by USG and National, wasn't it?

A. Oh, yes.

Q. And it was Mr. Fuller's idea, as disclosed by paragraph 3, that it would be wise for your company to let  
2186 the others go ahead and incur the expense, and then hop on the bus after it got running; isn't that right?

A. That is what he says. [Laughter.]



Q. Now, sir, as a matter of fact, foil board did not receive the customer demand, while you were in the industry, that it was anticipated it would, did it?

A. I can't say as to that.

Q. Well, isn't it a fact—

A. (Interposing.) I have no figures in mind at all.

Q. Well, isn't it a fact that up to the time you left the company, only a very small amount of board was purchased by your company from anybody, metallized board?

A. Yes.

Q. And wasn't that because it did not develop to have the customer appeal that Mr. Henning, at least, thought it would have?

A. I think it was handicapped by being a heavier board than the insulating board, and things of that kind, that didn't make it go so well as it might have.

Q. It didn't go well at all with your company, while you were with the company, did it?

A. We did not buy much of it.

Q. Will you look at Exhibit 292, please?

A. Yes, sir.

Q. Now in connection with the last paragraph, the fact is that Mr. Warren was mistaken, wasn't he, 2187 and that Paragraph X of your license, as a matter of fact, applied only to board manufactured by your company?

A. I don't recall this memorandum at all, Mr. Bromley. It probably passed through my hands, but I don't recall it.

Q. You don't recall whether or not you had any discussion with your lawyer about the matter?

A. No, I don't.

Q. Or with Mr. Fuller about the matter?

A. No, I don't.

Q. Did you know that the paragraph to which this memorandum referred, on page 3 thereof, provided that the "licensee expressly covenants and agrees that it will not, so long as this agreement shall continue in force and effect, after the receipt of such notice given in accordance with the terms and conditions hereof, directly or indirectly sell or offer for sale any plasterboard having a metallized surface manufactured by said licensee, embodying the inventions . . .", and so forth.

Mr. KNUFF. That is a matter for the Court to construe, Your Honor, not for this witness.

Justice STEPHENS. The witness may be asked whether he knew that an agreement which is in evidence contained

a particular provision, as the basis for examining him with respect to the reasonableness of conduct or letters in respect of it. That is proper cross-examination, Mr.

Knuff.

2188 Mr. KNUFF. He said he didn't recall this letter at all.

Justice STEPHENS. He is not being asked about the letter now. He is being asked as to whether he knew about that provision being in the contract.

The WITNESS. I have no present recollection of the matter.

By Mr. BROMLEY.

Q. You knew, however, as a general matter, Mr. Neale, that under the metallized board license the only prices of yours that could be fixed by USG were the prices of such board as you manufactured under the patent?

Mr. KNUFF. Just a moment, please.

The question is objected to as something that the Court will have to construe, not this witness.

Justice STEPHENS. I think, Mr. Knuff, that you misapprehend the nature of the Court's rulings on the difference between cross-examination and direct proof of the contents of exhibits.

Where agreements are being introduced in evidence and have been introduced in evidence, they must speak for themselves as to their meaning. The person introducing them is bound by them in that manner. He can't call someone else to tell what they mean. But this is cross-examination. The witness can be cross-examined upon his understanding of agreements, if that has a bearing upon  
2189 his conduct under them or conduct apart from them, which is alleged to be illegal. Under the Court's understanding of the rules of evidence, it is orthodox cross-examination.

Mr. KNUFF. As to this exhibit, Your Honor, when he says he doesn't recall anything about it?

Justice STEPHENS. The question before us hasn't got to do with that exhibit yet.

Mr. KNUFF. Then it is immaterial.

Justice STEPHENS. We can't tell that until other questions are asked.

I can't forbid counsel from asking what the witness' understanding of the agreement was with respect to price fixing. It may be that his next question will indicate that it is immaterial. If so, you can move to strike.

Mr. KNUFF. Then it is not cross-examination, because we haven't asked this witness anything concerning these prices under the contract.

Justice STEPHENS. Aren't you intending to prove by this witness, among other things, that there was a violation of the Sherman Act through price fixing, through these agreements as subterfuges?

Mr. KNUFF. We asked this witness whether his prices were the same for metallized board that they manufactured as for metallized board which they purchased from another.

We asked this witness nothing concerning the construction of the contract at all.

Justice STEPHENS. That is very true, but we thought you were offering this witness, among other things, as a part of the Government's case to prove an illegal price fixing and illegal dealings under these agreements, as subterfuges.

Mr. KNUFF. Of course, we have offered the witness for those purposes.

Justice STEPHENS. Then the witness can be cross-examined as to his understanding of the agreements in those respects. It is error, it seems to the Court, to deny cross-examination on that subject to bring out the full meaning and reasonableness of the witness' testimony.

The Court doesn't wish to argue the matter with counsel. However, the Court always feels under an obligation to state the reasons for its rulings. The Court shouldn't make rulings without reasons, and if it has reasons it likes to state them for the guidance of counsel. But it doesn't mean to argue the matter.

The objection is overruled, subject to a motion to strike if the future questions indicate that the examination is not material.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter as recorded on page 2485, lines 8 to 11, both inclusive.)

2191 The WITNESS. Yes.

By Mr. BROMLEY.

Q. Now, sir, will you refer to Exhibit 293?

A. Yes, sir.

Q. The last sentence reads: "Before that time, I shall expect to have in your hands a price filing on this material."

Now in that memorandum of yours to Mr. Hollowell, of the 5th of December, 1934, that reference to a price filing

was a price filing under the then existent and operative National Recovery Administration Code, was it not?

A. I don't remember.

Q. Don't you remember that as of this date, in December 1934, there was an NRA Code in the gypsum industry, and that your company was a member of that Code, sir?

A. I don't remember the dates that that was in effect. I certainly know there was an NRA Code.

Q. And that your company was a member, sir?

A. Yes, sir.

Q. And that under that Code, as approved by the NRA Administrator, all companies in the gypsum industry were required to file their prices with the Code Authority?

A. Yes, sir.

Q. Now look at that again, and aren't you able to tell me that that is the reference in the last sentence  
2192 intended by you, by the use of the words "price filing"?

A. It may either have been that, I should think, or my own sales bulletin giving notice at what price the board could be sold.

Q. At least, sir, it had nothing to do with USG or any other competitor?

A. No, I didn't send to the Division Sales Managers the copies of the bulletins of the USG.

2193 Q. I show you what purports to be a letter from Mr. Willard Fuller, your president, to Mr. Knode, of the United States Gypsum Company, dated April 23, 1935, and I ask to have that marked as Defendants' Exhibit No. 7 for Identification.

(The document referred to was marked Defendants' Exhibit 7 for Identification).

By Mr. BROMLEY.

Q. I ask you to read that letter, please?

A. Yes, sir.

Q. Does that refresh your recollection that as a matter of fact it was early in 1935 that your company got into production in the metallized field?

A. Certainly at that time we were taking steps to get into the manufacture right away.

Q. Do you recall, sir, that it was only shortly after the date of this letter, Defendant's Exhibit 7 for Identification, that you commenced to produce the board commercially?

A. I don't remember, sir, when we started to produce.



Q. Will you look at Exhibit 295, please, which is Mr. Sadler's letter to Mr. Neale, that is to you, of November 27, 1935?

A. Yes, sir.

Q. Now the prices referred to in that letter are the 2194 prices which U.S.G. charged you and which you were to pay for board purchased from them, isn't that right?

A. It was telling us what would be our cost.

Q. That is, what you would pay to U.S.G. for what you bought?

A. Yes.

Q. Now will you look at Exhibit 298, please. In the last sentence of the second paragraph, when you used the phrase "This plan", you did not mean to suggest that U.S.G. and Structural had any agreement, did you, with respect to prices or anything else?

A. Let me read the whole paragraph please.

Q. Surely.

A. What was your question?

Q. In using the word "plan" you didn't mean to suggest that you had any knowledge of any agreement between U.S.G. and Structural, did you?

A. I wouldn't say that I had any knowledge of any agreement.

Q. And in using the word "plan" didn't you mean merely to refer to the course of action?

A. "Program" might have been a better word.

Q. And isn't that true so far as the use of the word "plan" is concerned at the beginning of the third paragraph of that letter?

2195 A. I would think so.

Q. And isn't it true also with respect to where you used the word "plan" in the fourth sentence of the third paragraph?

A. If the program, or course of action, there indicated were carried out, then what I mentioned would result.

Q. I find the word "plan" used again in the third sentence of the third paragraph. Would your answer be the same as to its use there?

A. Well, frankly, that is the one I guess I was looking at a moment ago when I made reply.

Q. So your answer would be the same, would it?

A. Yes.

Q. And would it be the same insofar as the use of the word "plan" is concerned at the very beginning of the fourth paragraph near the bottom of the first page?

A. I would think so.

Q. And likewise so far as concerns the use of the word "plan" in the fifth paragraph, over the page, in the first sentence beginning, "Ebsary"?

A. I would think so.

Q. Now turn back to the bottom of page 1, in the fourth paragraph, there you use the phrase, in the last line near the end, "This being so, it was utterly absurd to make a statement to the trade" and so forth. Now "This being so" is your comment and is not meant to be a quotation or summary of anything that Mr. Henning said, is it?

A. I think perhaps it goes back to the first part of the preceding paragraph where I stated that it was my opinion that the plan, or program, was not fair and was impractical.

Q. So "This being so" refers to your comment and not to what Henning said?

A. I would think so.

Q. Now isn't it a fact, Mr. Neale, that the price increase of U.S.G. was announced about March 1, 1936, to be effective April 1, 1936, and that the talk which you had with Henning referred to in the fifth paragraph, which is the first paragraph on the second page, was some two weeks after U.S.G. had announced its price increase?

A. It is hard for me to place when that might be.

Q. Well, the memorandum, Exhibit 298, is dated March 23, isn't it?

A. Yes, sir.

Q. And announcement of U.S.G.'s price increase occurred March 1, did it not?

A. Or close to that.

Q. And the second sentence of the fifth paragraph, "When I was in Chicago the week before last" and so forth, clearly refers to a date which is subsequent to March first, doesn't it?

2197 A. I think it must.

Q. Now isn't it a fact that in that interview with Henning you were merely inquiring as to what U.S.G. was doing in this respect?

A. I may have been merely inquiring, or I may have been protesting.

Q. Well, did you make any agreement with Mr. Henning or have any understanding with him, as to what you, or he, or anybody else should or should not do about prices?

A. No; I think that is borne out somewhere later in this memorandum. I hoped that the price might be higher than it was fixed by his company.

Q. Well, isn't it a fact, sir, that at no time did you have any understanding with him as to what the price should or should not be, or what he or you should or should not do?

A. I don't recall any understanding.

Q. Now look at the fifth paragraph, which is the first whole paragraph, on page 2, again, beginning, "Ebsary would have nothing whatsoever to do with this plan" and so forth. Did you intend to suggest that there was any agreement, or that Ebsary were merely expressing his opinion of the price situation?

A. I don't recall the details now, Mr. Bromley.

Q. Well, were you ever a party to any understanding or plan to which Ebsary was a party, with respect to plaster prices?

A. I don't recall any.

Justice STEPHENS. How much more cross examination have you?

2198 Mr. BROMLEY. I am nearly through. If Your Honors will indulge me I think I can finish very promptly.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. Now in the eighth paragraph, which is the first one at the beginning of page 3, in the first sentence beginning, "Last Tuesday C.F.H. was in New York . . . and while here I put up to him a plan which I felt at least had the chance of working", and so forth.

Does that mean that you made any suggestion to Henning for an understanding or agreement as to what prices should or should not be, or what action you should both take co-operatively?

A. His company being the largest company, I was in hopes that they would set a price for their material that would enable my company to make a little money, because I couldn't hope to get any higher price than they were getting. All I could do was follow along if they set a price.

Q. And therefore all that you meant to suggest by this paragraph at the top of page 3 was that you were suggesting something to Henning, but you do not mean to suggest that you had any understanding with him?

A. No, I do not.

Q. Isn't it a fact that all you were doing was suggesting to him a method by which, as you thought, all

2199 companies could have a fairer basis to work on so far as protected job contracts were concerned?

A. I think that is a correct view of it.

Q. In the ninth paragraph, which is the next paragraph, on page 3, in the last sentence you say—or rather in the next to the last sentence—"In other words, they accepted the plan but felt that a dollar raise was better" and so forth.

Now again, in your use of the word "accepted" you did not mean to suggest that you and Henning came to any understanding as to what he would do, did you?

A. No; and I think that is borne out by the action that followed; and about which I am reporting here.

Q. You refer to the fact that Mr. Henning did not accept your suggestion but did something other than what you suggested?

A. Yes.

Q. You suggested a \$9.00 price and he came out later with a notice to the trade that after April 1st they would take specific job contracts only at \$8.50, isn't that right?

A. That is what the letter says.

Q. And in the last reference in that paragraph where you say, "I followed the U.S.G. with a letter to the trade two days later", and so forth, the issuance of that letter was not the result, was it, of any understanding which you had with Henning that you would do that?

2200 A. No.

Q. Now in the next paragraph, in the second sentence, you say "Ebsary himself has just returned from the south and has not made up his mind whether he will follow or not". You had no understanding with Ebsary, did you, as to what he would or would not do?

A. No.

Q. In the next sentence you say, "It is my guess that the plan would appeal to him" and so forth. Is your answer the same with respect to the use of the word "plan" there as it has been heretofore?

A. I would see no reason to change it.

Q. Now in the last sentence on the last page, "... it will be at least six months before we can hope to raise the market price for stock deliveries"—by the use of the word "we" you intended to refer to Atlantic, did you not?

A. I think so.

Q. During the time that you were with Atlantic, Mr. Neale, isn't it a fact that the only prices which U.S.G. ever fixed were prices on patented board manufactured by your company, so far as your company was concerned?

A. So far as my company is concerned, yes.



Q. And isn't it a fact, sir, that you never had any agreement or understanding with anybody with respect to the prices of plaster or other unpatented gypsum products?

2201 A. That is true.

Mr. BRÖMLEY. That is all.

Justice STEPHENS. Is there any further cross-examination by counsel for other defendants? If not, is there any redirect examination?

Mr. KNUFF. We have no redirect examination, Your Honor.

Before the Court adjourns, we had intended to call Mr. George Brown today, and it is now a quarter after four. We would be willing to continue if it is satisfactory to the Court.

Justice STEPHENS. How long will he be on the witness stand?

Mr. KNUFF. I would say, on direct examination probably an hour or a little better.

Justice STEPHENS. The Court was about to say, Mr. Knuff, that it regrets that it cannot offer to sit on Saturday, but one of the members of the Court came here on Monday against his doctor's orders with respect to a cold that he had, Judge Jackson; and I have duties with respect to the Patent Interchange Committee, of which I am Chairman, which fall upon my shoulders tomorrow. Also, in view of the complications and length of the trial, we will probably run into this situation every week-end, in any event.

Mr. KNUFF. The only reason I mention it at this time is that Mr. Brown tells me that he is in the same situation as Judge Jackson. He feels that he should be in

2202 bed and we are not inclined to ask General Brown to come back on Monday. However, we wouldn't want to have the Court sit without any witnesses and we will have other witnesses on Monday, but he thinks he will have to go to bed when he gets home.

Justice STEPHENS. We cannot sit tomorrow, nor longer today. The difficulty of sitting beyond four o'clock is that the court reporter's service is necessarily pushed then. Last night the testimony didn't reach me until 9:30, and it makes such a long night of reading for the Court that it is almost impossible to keep it up. In an emergency it is all right, but we cannot do it regularly.

The Court would suggest that you excuse Mr. Brown until he has recovered from his cold, and then call him at a later time, and if you run out of witnesses we will not criticize you.

Mr. KNUFF. We will be glad to do that.

Justice STEPHENS. The Court hopes counsel for the defendants will be able to find the lost exhibits. If the Court could convict the defendants of having possession of them, the Court would urge the defendants to photostat a new set, but the matter seems to be one of accident, of course it is one of accidental misplacement, and we hope you will be able to find them by Monday because we must have three sets of these exhibits regularly for use of the Court at the end of the examination. Counsel for the defendants may have them before the examination but we need  
2203 them at the end of the examination to read them with the testimony.

So please try to discover them by Monday.

Mr. JOHNSTON. I might suggest, in view of past experiences, that you might look on the table of counsel for the Government again. [Laughter.]

Justice STEPHENS. The Court requests all counsel, and the court reporter and all other persons connected with the Court, to look for these exhibits.

Announce a recess until Monday at 10 o'clock.

Just one moment. Are you through with this witness, gentlemen?

Mr. KNUFF. We are through with this witness for the present, and he may be excused, if it is satisfactory to the defendants.

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. You are excused, Mr. Neale, and thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. Announce the recess.

(Whereupon, at 4:17 o'clock, p.m., the hearing was recessed until Monday morning, December 20, 1943, at 10:00 o'clock).

2204 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM  
COMPANY; CERTAIN-TEED PRODUCTS CORPORATION;  
THE CELOTEX CORPORATION; EBSARY GYPSUM COM-  
PANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M.

GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
*Washington, D. C., Monday, December 20, 1943.*

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2209 With respect to Exhibit 298, the Court notices, Mr. Bromley and Mr. Knuff, in rereading that exhibit, for example, in paragraph 3:

"This plan to raise prices was utterly worthless for two reasons; (1) it was not fair; (2) it was impracticable." And going on to the sentence beginning with the word "Under", which I think is the fourth sentence in the third paragraph on page 1 of Exhibit 298, "Under the plan as soon as the price of \$7.75 became effective, all of the contracts which Cyanamid and U. S. G. had signed would be validated."

Is that a correct word—"validated"—or does that need explaining? It seems to me the word should probably have been "violated".

Mr. KNUFF. No, "validated" is correct, Your Honor.

Mr. BROMLEY. It needs an explanation, I think. I think the explanation is that if there were outstanding specific job contracts at \$7.50, those contracts wouldn't be any good if the market price were lower than \$7.50, because the evidence shows—or it was referred to in the opening—that that protected job business doesn't work both ways. If a

2210 manufacturer protects a dealer, the manufacturer has to supply the goods at the price which he says he will supply them at, even if the market price goes higher. But if it goes lower, then the dealer can get the benefit of the power price. So that this is just a way of saying that when the market price became \$7.75, then all those specific job contracts at \$7.50 were binding on the manufacturer, and he would have to fill them at that price.

Justice STEPHENS. I see. Thank you for that explanation.

In that same exhibit, in the first full paragraph on page 2 of the exhibit,—still referring, Mr. Reporter, to Exhibit 298,—“You may recall that some months ago Fred Ebsary advanced the idea”—it is in the third sentence of the first full paragraph on page 2—“that a small raise of 25 or 50¢ would be a good idea provided that there was no protection at all.”

What is the meaning of the word “protection” in that sentence?

Mr. BROMLEY. Provided that no manufacturer entered into arrangements with dealers whereby he agreed to protect the dealer on specific jobs at the lower price.

Mr. KNUFF. That is a correct explanation, Your Honor.

Justice STEPHENS. There is almost as much of a jargon in business terminology as there is in the law. Sometimes it needs explanation to mere lawyers and judges.

2211 One other question with respect to the meaning of the record, for the Court's information.

With respect to Exhibit 292, examination was being conducted in respect of that—this is cross-examination, I think, by Mr. Bromley—at page 2483, at the bottom:

“Q. Will you look at Exhibit 292, please?

“A. Yes, sir.

“Q. Now in connection with the last paragraph, the fact is that Mr. Warren was mistaken, wasn't he, and that Paragraph X of your license, as a matter of fact, applied only to board manufactured by your company?”

That reference was the second paragraph of Exhibit 292. That puzzled the Court, your cross-examination puzzled the Court, because the understanding, at least of the Judge speaking, was that this exhibit is talking not about prices but about royalties; and the Court thought that it was conceded in the case, indeed asserted by the defendants, that the royalties were upon not only the board manufactured but upon the board sold. Yet your cross-examination would seem to be correcting that.

I probably don't understand the situation, and I only call it to your attention because I want to be sure that I do understand it.

Mr. BROMLEY. I think the fact is that royalties under all of these license agreements are only payable on  
2212 board manufactured and sold.

Justice STEPHENS. I thought I remembered you saying, in the opening of this case, that the royalties were fixed upon all of the products sold by the licensees, and that that did not constitute price fixing upon the products



not licensed because it was a mere measure of the royalty rather than anything else.

Mr. BROMLEY. Well, it is true that the general license agreements provide for the fixing of royalties on board whether patented or unpatented. That is the measure of the royalty. But I understood that to mean only board manufactured and sold, whether patented or not.

Justice STEPHENS. I see what you mean.

Do you have any comment to make on that, Mr. Steffen?

Mr. STEFFEN. I would say, in regard to the general license agreements of October and November, which appear in the Complaint on page 70, that the royalty is to be paid on all board, whether manufactured or not. It says specifically in paragraph 3:

"... equivalent to three and one-half per cent ( $3\frac{1}{2}\%$ ) of the selling price of Licensee of all plasterboard and gypsum wallboard of every kind, whether or not made by the use of said machines and/or embodying the inventions and improvements set forth and claimed in said letters patent or applications for letters patent . . .", and so on.

2213 Justice STEPHENS. Where are you reading from?

Mr. STEFFEN. In the middle of page 70, paragraph 3, of the Complaint, which, as I construe it, calls for payment of royalty on all board of whatever kind.

Justice STEPHENS. Well, perhaps that is a matter which the Court had better leave to general discussion in closing arguments in the case. We like to understand these things, as far as we can, as we go along, and perhaps it is better to ask questions. The Court always prefers to appear ignorant rather than to remain ignorant.

Mr. KNUFF. I think, if Your Honor pleases, what the memorandum had in mind appears on page 116 of the Government's Complaint under paragraph X:

"Licensee agrees that on or before the fifteenth day of each calendar month it will furnish to Gypsum Company a written report, under the hand and verification of some officer or other duly authorized agent of Licensee, showing the total amount of plaster board having a metallized surface sold by Licensee during the preceding calendar month and which was manufactured by Licensee under the rights, licenses and privilege herein granted. . . ."

Now it is entirely possible that a board could be manufactured, we will say, in January, but that board wouldn't be sold until February, and in a situation like that the licensee wouldn't have to pay the royalty until the

2214 time that board was sold, and I think that is what the letter had reference to.

Justice STEPHENS. Where were you reading from?

Mr. KNUFF. I was reading from page 116 of the Complaint, under paragraph X. I think that is what the memorandum had reference to.

It didn't have reference to this particular contract, because the contract we set out here is the Ebsary contract, but the Ebsary contract was identical, as I understand it, with the Atlantic contract.

Justice STEPHENS. Thank you, gentlemen.

Mr. BROMLEY. Could I say, before we leave that subject, if the Court pleases, that in connection with the memorandum, Exhibit 292, the second paragraph, it is plain from looking at the provision of the agreement to which Mr. Knuff has referred that Warren was mistaken, because paragraph X on page 116 uses the word "manufactured"; and that is what I developed on my cross-examination, that the royalties are payable only on board manufactured and sold. And that appears in the 6th line as read by Mr. Knuff, in paragraph X.

And before we leave that subject, Mr. Steffen's reference to page 70 of the Complaint, paragraph 3 of the general license agreement, you will see in the 8th line from the bottom, at the end of the sentence—that line beginning: "all such plasterboard and gypsum wallboard manufactured and sold . . ."

2215 Then up five more lines: ". . . letters patent or applications for letters patent, manufactured and sold . . ."

So that I think a reading of the whole paragraph rather than parts of it will show that even in those agreements, royalties were paid on board manufactured and sold.

Justice STEPHENS. We understand the contentions of counsel in that respect.

Mr. BROMLEY. That is the basis on which royalties were paid, anyway.

Mr. FINCK. Last week, metallized board and perforated lath were referred to in the testimony a great many times. Now inasmuch as defendants National and Baker are not charged in the Complaint with any violation under the antitrust laws because of National's manufacture and sale of metallized board and perforated lath, it seems to me that I would like to have the record show a continuing objection for National and Baker with respect to all evidence introduced by the Government relating to metal-

lized board and perforated lath, on the ground that such evidence is incompetent, irrelevant and immaterial, and has no bearing on the issues as between the Government and National and Baker. :

Now it should be noted, as I say, that it is very difficult and impractical for us to ask that those answers be stricken, as to Baker and National, each time they are made. It seems to us if we have a continuing objection, then  
2216 at the end of the testimony we can move to strike such portions of the testimony as refer to metallized board and perforated lath.

Justice STEPHENS. Was the testimony on that subject, the subject of perforated lath and metallized board, offered, Mr. Knuff, in reference to National?

Mr. KNUFF. I don't understand Mr. Finck's contention. I will say that National was not a licensee under the perforated lath license, but they definitely were a licensee under the metallized lath agreement. Their license is dated October 5, 1934, and is in evidence as Government's Exhibit No. 19. They were licensees under the metallized lath license agreement. They were not licensees under the special perforated lath license agreement.

Mr. FINCK. Well, if the Court please, we did have a license, but there is no charge made against National of any violation because of its manufacture and sale of metallized board. They except National in each instance in the charges in paragraphs 113 and 114 of the Complaint. In each case they say "except National". That is, there is some charge as to others of a violation of the antitrust laws because of certain sales of metallized board purchased from other licensees.

Justice STEPHENS. Where is the exception of National in the first paragraph, paragraph 113?

2217 Mr. FINCK. I am mistaken on that. There is no exception there. But in the charge under paragraph 114—

Justice STEPHENS (interposing). Do you charge National with a violation of the antitrust laws with respect to metallized board?

Mr. KNUFF. Definitely.

Justice STEPHENS. Where?

Mr. KNUFF. First, we charge them under the general charging paragraph, which is paragraph 44.

Mr. FINCK. What do you charge?

Mr. KNUFF. We charge them with entering into contracts in violation of the Sherman Antitrust Act and con-

spiracy to fix the price of the wallboard and various other gypsum products.

Mr. FINCK. We are talking specifically about metallized board, and I see no charge as against National. It says here:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board, but all of said licensees, except National, intended, as U. S. G. well knew, to purchase metallized board from U. S. G. or National for resale to dealers and consumers. Notwithstanding said facts, U. S. G. required its licensees to execute said agreements in order

2218 to be enabled to purchase metallized board for resale to dealers and consumers. Throughout the period from the execution of said license agreements to the date of filing this complaint, U. S. G. has determined and fixed the minimum prices and terms and conditions of sale governing the sale by its licensees of metallized board, with the knowledge, and notwithstanding the fact, that a substantial part of the metallized board sold by its licensees, except National, during said period was purchased from National and U. S. G."

You see, we didn't do anything wrong.

Mr. KNUFF. The exception was that National didn't buy the board from somebody else. That is what we are excepting in there, that National didn't buy the board from some person else.

Mr. FINCK. But if we didn't buy the board from some other licensee, then we couldn't have violated your charge, could we?

Mr. KNUFF. Certainly.

Mr. FINCK. How?

Mr. KNUFF. Well, I think this can be taken care of—I don't care to stand up here and argue this morning on this thing—I think this can be very amply taken care of in two respects: (1) it can be taken care of on final argument, and (2) it can be taken care of very appropriately at the time we make the offer, which we intend to do, concerning the resale price and concerning all other  
2219 charges that we have in this Complaint. We are going to clear up, once and for all, the matter of overt acts, and we will definitely clear that up.

Justice STEPHENS. Well, the Court thinks that there is no impropriety in counsel being asked to argue the matter now, Mr. Knuff.

Mr. KNUFF. We are not prepared, Your Honor.



Justice STEPHENS. Of course, the Court is confronted with an objection, and the Court is bound to rule on the objection. The objection is that under the Complaint there is no charge against National with reference to metallized board or with reference to perforated lath. You are certainly prepared as to what your Complaint charges?

Mr. KNUFF. Oh, yes.

Justice STEPHENS. If you think there is some other topic, however, raised by the objection, which you ought to have further opportunity to argue, the Court will not insist upon you arguing that now, if you think it is going to be covered by this offer. The offer, I thought, had to do with the resale of products other than metallized lath.

Mr. KNUFF. It will have to do with that, and with clearing up this whole situation, what we conceive to be the vice in the Court's ruling as to the whole situation.

Justice STEPHENS. What whole situation?

Mr. KNUFF. On the ruling on the excluding of 2220 evidence concerning the resale price, and on all rulings of that nature. We think we can point out very, very definitely, with abundant authority, as to what the Complaint should charge. We can point out with abundant authority that when we do specify certain overt acts, that those overt acts are not the only overt acts; and this question that Mr. Finck now raises, if I understand him correctly, will be covered in that offer and in the memorandum that we are going to submit at the time we make that offer. It has been passed upon very, very recently. For instance, in the *General Motors* case it was passed upon. We are going to have a complete memorandum for Your Honors' consideration at that time.

Justice STEPHENS. Can you postpone your objection until then, Mr. Finck?

Mr. FINCK. I would like to have a continuing objection to all that testimony. It doesn't seem to me that that would harm anything at this time.

Justice STEPHENS. The objection may be recorded. The Court will postpone a ruling upon it until the offer which the Government now refers to, and you may call the Court's attention to the objection at that time.

Mr. FINCK. May I make one other observation at this time. It seems to me that things ought to be cleared up by the Government as to what we are to defend against, pretty soon. We have gone all through this from time 2221 to time, and each day we hear of something else that the Government is to clear up. Now it seems

to me we have had this Complaint for several years, and they understand what we interpret it to mean. But we are still in the dark as to the Government's position.

Justice STEPHENS. Perhaps this offer of proof that counsel for the Government intend making, and the memorandum submitted on it, will clear that up.

Mr. FINCK. Thank you.

Justice STEPHENS. It would be a very good thing, I think, from the standpoint of the efficient conduct of the trial, if all persons could know, including the Court, just what the Government is charging the defendants with, so that they may have an opportunity to prepare to answer it, and so that we may be advised better with respect to ruling. The rules contemplate no surprise, and the Court doesn't intimate that the Government is trying to effect any surprise, but we should have an understanding pretty soon, I should think, as to just what the various charges are that are to be met.

Mr. KNUFF. The charging portion of this Complaint is paragraph 44 of the Complaint. We have set forth in paragraph 44 in the language of the Sherman Antitrust Act, the various violations that we contend the defendants have committed in this case.

Justice STEPHENS. Will you contend, Mr. Knuff, 2222 in your argument, that if that was the only paragraph in your complaint, the paragraph would be a sufficient complaint, in the presence of a demand for a bill of particulars to support the Government's cause of action? Can we ignore all the balance of your complaint?

Mr. KNUFF. We wouldn't want you to ignore anything that is in the complaint. But paragraph 44 is the charging paragraph, and since we have charged that in the language of the statute itself, irrespective of what the new rules say paragraph 44 would be sufficient.

Justice STEPHENS. You think that paragraph alone would be sufficient on which to try this entire case?

Mr. KNUFF. I don't think there is any doubt about it. I don't think there is a bit of doubt about it, and I think that we will be able to convince the Court of that when we submit this memorandum.

Justice STEPHENS. Very well, the Court will suspend its ruling and hold its mind open on that subject.

Mr. JOHNSTON. On behalf of Texas, I would like to adopt the same objection, and also call attention to the fact that Texas did not have a contract covering metallized or perforated board. I don't think the Government even charges that.

Justice STEPHENS. The objection may be recorded. The Court will rule on it at the time of this proposed offer.

2223 Mr. ADAMS. I have one matter affecting the personal convenience of counsel, Your Honor. Several of the counsel have been able to get transportation to New York on Wednesday at 4 o'clock, and it occurred to us that it might be possible for the Court to recess a little earlier on that day so that we can get down to the station. We were hopeful that we might be able to suspend at perhaps 3:15 or 3:30 on that date.

Justice STEPHENS. Yes, that can be done.

You may proceed, gentlemen.

Mr. KNUFF. If either Mr. Bromley or Mr. Finck will return to me the Arthur Black exhibits, I will be in a position to furnish each member of the Court with a copy of those exhibits.

Mr. FINCK. We are returning both the Black exhibits, the Whittemore exhibits, and the Miller exhibits.

Mr. KNUFF. Thank you.

Justice STEPHENS. I perhaps ought to say to counsel for the Government, in order that they may have an opportunity to argue upon doubts that arise in the Court's mind with reference to the subject we have just been discussing, that the thing that puzzles me, and I think my colleagues, about the Government's position is this: Assuming that a cause of action could properly be stated, under the new rules, by alleging nothing but paragraph 44

2224 in the Complaint, the fact is, nevertheless, that the Government has alleged more than paragraph 44. It is alleging paragraph 44 and a very large number of other paragraphs which specify in some detail the nature of the Government's case. It seems to the Court that when it has done that, the Court can't ignore all the other allegations of the Complaint and look only at paragraph 44. It has got to read the Complaint as a whole. And we thought that the Complaint had been drawn as specifically as it was for the purpose of advising the defendants and the Court of the exact nature of the charge.

What the Government is now contending is that it can do a third thing—it can allege paragraph 44, it can specify the detail of the charge as it is amplified in the balance of the complaint, and then at the time of the trial it can come in with a third class of charges, not referred to.

That seems to us to be a very novel position for a pleader to take. The defendants are entitled at some time in the case to know, through the pleadings, what the items are

that they will be expected to meet; and the same rule would seem to be applicable to the defendants' pleadings, that the nature of the defenses having been specified, after general denials of violation of the Antitrust Laws, that those are the defenses upon which they will be expected to pitch their defense; and that in the absence of amendment allowed on one side or another, that that was where the case is made.

2225 The purpose of pleadings, both defendants' pleadings and Government's pleadings, is to advise not only counsel on both sides of the case, but the Court, as to what the issues in the case are, and with sufficient specificity so that preparation can be made.

I state that only because you may wish to argue a different point of view.

Mr. KNUFF. Thank you.

Mr. BROMLEY. So it won't be overlooked, if the Court please, I would like to say that just to guard against this very sort of a thing, all the defendants here went to a great deal of trouble and expense to make voluminous motions for bills of particulars. I remember we printed a chart about that big (indicating) lining up our demands—and we argued it very fully and we were granted a bill of particulars—just to guard against this sort of thing happening at the trial.

I just mention that now to show that the pleadings of this case have been supplemented by very carefully drawn bills of particulars in response to a careful decision by a District Judge in this District.

Justice STEPHENS. You may call your next witness, Mr. Knuff.

Mr. KNUFF. Arthur Black!

2226 Thereupon, ARTHUR R. BLACK, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Where do you live, Mr. Black?

A. Port Clinton, Ohio.

Q. By whom are you employed?

A. At present?

Q. That is right.

A. The Celotex Corporation.

Q. In what capacity?

A. As a supervisor.



Q. Supervising what?

A. In gypsum products, of sales activities.

Q. And what is the nature of that work?

A. To go over the territory, particularly in the Cleveland Division, contacting the representatives of the Celotex Corporation with regard to their sales activities, and also contacting the customers in those different districts.

Q. By "representatives of the Celotex Corporation", do you mean salesmen?

A. That is right.

2227 Q. And do you have general charge of the salesmen in that particular district under somebody else's jurisdiction?

A. The Cleveland Division is controlled by Mr. Dierking, and I work under his direction.

Q. And the Cleveland Division consists of what?

A. Part of Ohio, and Kentucky—part of Kentucky.

Q. What part of Ohio?

A. All of Ohio with the exception of a small portion of the eastern area running from up near the Lake down to the Ohio River.

Q. And part of Kentucky?

A. And a part part of Kentucky.

Q. And what part of Kentucky?

A. Principally the towns of Louisville and Lexington, and the territory between.

Q. That is, the towns of Louisville and Lexington, that is across the river from Cincinnati, is that what you mean?

A. No, Louisville is down the Ohio River 100 miles or more, and Lexington is south of Cincinnati some 60 or 70 miles.

Q. And you have general charge of the sales policies and have charge of the salesmen in and about the district that you have testified to?

A. Not quite correct, Mr. Knuff, because I work under the direction of Mr. Dierking, the Cleveland Division manager, who has charge of that Division.

2228 Q. Are you his assistant?

A. As one of his assistants, as a supervisor, in contacting these different salesmen and the customers, and looking over their problems.

Q. Does Mr. Dierking have any other salesmen that he supervises, other than the salesmen that you supervise?

A. Not to my knowledge.

Q. In other words, you are more or less his assistant, if I understand you correctly. Mr. Dierking and you determine the policy that the salesmen shall pursue, is that correct?

A. No, Mr. Dierking outlines the policy, principally. I have been with him simply—recently the most of my activities have been in looking after the larger jobs under construction.

Q. You have nothing to do with the determination of policy?

A. No, sir.

Q. You have been with the Celotex Company since 1939, I would take it, is that correct?

A. Yes, sir, ever since then.

Q. Celotex took over the American Gypsum Company sometime in 1939, April 1, I believe, wasn't it?

A. 1938 or 1939.

Q. Before that, with what company were you associated?

2229 A. The American Gypsum Company.

Q. And when did you first enter the employ of the American Gypsum Company?

A. As I recall it, it was in 1907.

Q. In what capacity?

A. Sales Manager.

Q. And you were with the American Gypsum Company as Sales Manager from that time until the time Celotex absorbed American Gypsum; is that correct?

A. Not continuously. During the early 20's I was away from the American Gypsum Company for a period of about 2 or 3 years.

Q. And then you came back with the American Gypsum Company in the same capacity?

A. Correct.

Q. And you have been, then, say from about the middle of the 20's or the late 20's, you have been with the American Gypsum Company as their Sales Manager up until the time Celotex absorbed it; is that correct?

A. Correct, yes, sir.

Q. Who was the General Manager of American Gypsum Company after you came back with them in the middle 20's or late 20's, or in the 20's?

A. Mr. F. J. Griswold.

2230 Q. Do you recall, sir, the situation in the gypsum industry beginning with the year 1926 and including 1927 and 1928—I have particular reference

to the demoralized price conditions. Are you familiar with that?

A. To a certain extent.

Q. Were prices demoralized in the gypsum industry during those years?

Mr. BROMLEY. I object to that as calling for a conclusion and therefore incompetent.

Justice STEPHENS. The objection is sustained. Ask him about the specific price changes, and the lowering of prices, and the price competition.

By Mr. KNUFF.

Q. Well, with reference to the prices of gypsum products in 1928, were they the same or higher or lower than the prices for the same products in 1926?

Mr. BROMLEY. The same objection.

Mr. KNUFF. I think that doesn't call for a conclusion. It calls for a comparison of prices.

Justice STEPHENS. We will overrule that objection, provided you know. Do you know the answer to the question?

The WITNESS. Your Honor, I don't remember exactly what the prices were in 1926—

Justice STEPHENS (interposing). You are not being asked for the exact prices. You are being asked, as compared with 1927 and 1928, whether in 1926 they  
2231 were lower or higher on the type of products referred to.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. I don't know as you have answered my question. Were the prices in 1928 higher or lower, or the same as during the period of 1926?

A. My recollection is that in 1928 they were some lower.

Q. By "some lower", what do you mean, sir?

A. Dollars and cents.

Q. Well, they were some dollars and cents lower—I don't know as I understand exactly what you mean.

A. Well, I don't know—

Q. (Interposing.) Can you give it to us in percentages if you can't in dollars? Were they 10 percent or 15 percent or 50 percent, or what percent?

A. I wouldn't recall.

Q. What is your best recollection?

A. My recollection is that were from 10 to 20 percent lower.

Q. When did the gypsum industry reach its peak in the 20's?

Mr. BROMLEY. I object to that as incompetent, because calling for a conclusion.

Justice STEPHENS. The question is so general, 2232 Mr. Knuff, that the answer won't mean anything. Objection sustained.

Mr. KNUFF. It was purely a preliminary question. I was going to follow that with other questions.

Justice STEPHENS. Objection sustained.

By Mr. KNUFF.

Q. Do you recall, sir, that the stock market crash occurred in 1929?

A. Yes, sir.

Q. Had the gypsum industry entered into a period of decline previous to that time?

Mr. BROMLEY. The same objection.

Justice STEPHENS. The question is so very general that it seems almost related to nothing under the pleadings—had the gypsum industry entered into a decline.

Mr. KNUFF. Of its very nature it has to be general.

Justice STEPHENS. You may ask this witness to tell what happened to the gypsum industry, in his own way, if he knows about it.

Objection sustained.

By Mr. KNUFF.

Q. You were Sales Manager of the American Gypsum Company in 1926, were you?

A. I think so, I am not positive of that date.

Q. Were you Sales Manager in 1928?

A. Yes, sir.

2233 Q. Were you with the gypsum company, the American Gypsum Company, in 1926?

A. As I recall, I was.

2234 Q. Well, if you were with the American Gypsum Company in 1926, in what capacity did you serve?

A. For a while, when I returned to the company, I was stationed in Detroit, looking after the Detroit area.

Q. And how long were you up in Detroit?

A. I don't recall.

Q. Was it a matter of years?

A. Yes, about a year, I think, or something like that. Then, later on, I was called to Port Clinton, and put in charge of sales, general sales.



Q. Can you fix that date with any approximate degree of certainty, when you came back to Port Clinton?

A. No, I can't, Mr. Knuff. I wouldn't be able to fix that even approximately.

Q. Was it before the stock market crash in 1929?

A. Yes, sir, I was in Port Clinton then.

Q. How long had you been in Port Clinton prior to the stock market crash of 1929?

A. I don't recall.

Q. A matter of years?

A. I had always lived there during those years.

Q. You live in Port Clinton—

A. (Interposing.) That was my home.

Q. (Continuing.) —although your office was in Detroit?

A. Yes, sir.

2235 Q. Now what was the nature of your employment in Detroit?

A. Looking after, supervising, the salesmen, and contacting the trade in the Detroit area.

Q. Now during that period from, we will say, 1928, on, was there competition in the gypsum industry?

Mr. BROMLEY. Objected to as incompetent because calling for a conclusion.

Mr. KNUFF. Well, while it is true that almost everything that we say is a matter of conclusion, nevertheless competition is a fact also.

Justice STEPHENS. Well, it is probably preliminary. Overruled.

Mr. KNUFF. Will you read the question, Mr. Reporter? (Thereupon, the pending question was read by the reporter.)

The WITNESS. Yes.

By Mr. KNUFF.

Q. Can you characterize that competition, sir?

Justice JACKSON. Do you understand the question?

The WITNESS. No, I don't, your Honor.

Justice JACKSON. I don't, either.

By Mr. KNUFF.

Q. Was the competition keen and sharp, or was the competition more or less languid?

2236 Mr. BROMLEY. I object to that as entirely improper and calling for a conclusion, and therefore incompetent.

Justice STEPHENS. Well, the questions are technically incompetent, and yet they probably can't do any harm. We don't see why you don't ask the witness about the particular situation, if he knows. That is what the other witnesses have testified to, and there isn't any dispute in the case, in fact it is conceded in the pleadings, that the answers to these general questions are "yes".

It would seem to be taking unnecessary time to continue these general questions.

However, if it is preliminary, in an attempt to direct the witness' mind to particular topics which you have in mind, the Court will overrule the objection.

Mr. KNUFF. I just wanted to bring out very definitely that there was keen competition in the industry at that time. I just wanted to be sure that it was understood. Now if that is the general understanding I will stop right there.

Justice STEPHENS. Is there any dispute about that, Mr. Bromley?

Mr. BROMLEY. There has always been keen competition in the gypsum industry, then as well as at all other times.

By Mr. KNUFF.

Q. Was there a price war on in the gypsum industry at that time?

2237 Mr. BROMLEY. I object to that as calling for a conclusion.

Justice STEPHENS. If the witness knows as a businessman engaged in the industry—

Mr. KNUFF (interposing). He was a sales manager at that time, your Honor.

Justice STEPHENS. The Court will treat that as preliminary and overrule the objection. But the witness must be asked eventually, Mr. Knuff, what the specific things are that you apparently have in mind. Whether or not price wars existed is a question that the Court must eventually pass upon to the extent that it is in issue, and therefore witnesses cannot testify to it unless they are produced as experts on the subject of economic conditions.

Overruled. Please try to make your questions more specific. This witness must know, if he has been in the industry so long as he testifies, what the practices were that were going on at the time in respect of an alleged price war, and you can direct his attention to those.

Mr. KNUFF. You may answer the question, Mr. Black.

Justice STEPHENS. The question is, was there a price war in the industry at the time that counsel referred to?

The WITNESS. It was considered a price war.

By Mr. KNUFF.

Q. How long did that condition prevail?

2238 A. As I recall, it was approximately two years.

Q. And when did it end?

A. As I recall, there was an improvement, I wouldn't say it ended—

Q. (Interposing.) You said it lasted for a period of two years. Now if you will tell me when it began, that is all I want to know; or if you will tell me when it ended, that is all I want to know.

A. I can't furnish you the exact dates, but according to my recollection, it extended through 1928 and 1929.

Q. And ended sometime in 1929?

A. About in 1930, as I recall.

Q. Now do you recall when American Gypsum Company became a licensee under the so-called Hite and Haggerty patents? It is in evidence, Mr. Black, that the license from USG to American under the Hite and Haggerty patents was dated November 25, 1929.

A. If that is the one you refer to in your question, I recall that.

Q. And about the latter part of 1929 or the first part of 1930, you say brought to a conclusion the competitive price war?

Mr. BROMLEY. He didn't say that, if the Court please. he said sometime in 1930.

Justice STEPHENS. That is correct, the objection 2239 is well taken.

By Mr. KNUFF.

Q. During this period that you are testifying about, concerning this price war, were the prices stable for plaster, board, and other gypsum products?

A. Not what I would term stable, they were quite uncertain.

Q. And by "uncertain" do you mean unstable?

A. Right.

Q. I show you, sir, Exhibit 203. Will you please look at it?

Justice STEPHENS. Is that the August 15th letter, Mr. Knuff?

Mr. KNUFF. That is the letter of October 11, 1928.

Justice JACKSON. It is already in evidence, isn't it?

Mr. KNUFF. It has been identified, but has not been offered yet.

By Mr. KNUFF.

Q. Would you look at this letter, Mr. Black? Is that your signature on it?

A. Yes, sir.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 203.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Let the Court refresh its recollection on the exhibit.

Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 203 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Black, in 1929, who was Chairman of the Board of Directors of the American Gypsum Company?

A. As I recall it, Mr. John A. Kling.

Q. Of Cleveland?

A. Yes.

Q. You knew Mr. Kling?

A. Yes, sir.

Q. And had known him for how many years?

A. Approximately twenty years.

Q. At that time was Mr. Kling active in the affairs of the American Gypsum Company? I am talking about 1929. You can put that letter aside, if you will.

A. Yes, sir.

Q. He was active in the affairs of the American Gypsum Company in 1929?

A. Yes, sir.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 299, the same being  
2241 a letter dated August 15, 1929, addressed to Mr.

A. R. Black, and signed John A. Kling. Will you please look at that letter and tell me whether or not that is Mr. Kling's signature that appears thereon?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if your Honor please, Government's Exhibit 299.

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. Received in evidence, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 299 was received in evidence.)



By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibits Nos. 300 and 300-A, the first being a letter dated June 23, 1934, addressed to Mr. Arthur Black, and signed M. H. Baker; and Exhibit 300-A being a copy of a letter addressed to National Gypsum Company and signed, or purported to be signed, by Elmer E. Finck. Will you please look at both of those exhibits? Exhibit 300-A is dated June 18, 1934.

Did you receive that letter from Mr. Baker?

A. As far as I know, I did.

2242 Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibits Nos. 300 and 300-A.

Justice STEPHENS. Let the Court read them.

Mr. FINCK. If the Court pleases, I object to 300-A—

Justice STEPHENS (interposing). Wait until we read them, Mr. Finck, and then we can tell more about the objections.

Mr. FINCK. Excuse me.

Mr. KNUFF. I wonder if we could have a short recess while the Court is reading these.

Justice STEPHENS. Yes, the Court will be in recess for five minutes.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

Justice STEPHENS. Now do you have an objection, Mr. Finck?

Mr. FINCK. Yes, your Honor.

I object to Exhibit 300-A. I have no objection to Exhibit 300; but Exhibit 300-A, the letter dated June 18, 1934, refers entirely to a metallized gypsum board license. Now it seems to me that that is immaterial. It only refers to the position that National Gypsum Company is to take regarding a metallized board license. It seems to me that National, not having been charged in the complaint with any violation of a metallized board license agreement, that this is immaterial as to National.

Justice STEPHENS. In other words, your objection is the same as that which you made a short time ago?

Mr. FINCK. Yes; and furthermore, if it is offered as an admission of a co-conspirator, it seems to me it cannot possibly be that because National cannot possibly be a co-conspirator in such case.

Justice STEPHENS. Well, this raises the same question?

Mr. FINCK. Practically, yes.

Justice STEPHENS. Do you wish to defer arguing this, Mr. Knuff, until your offer of proof is made?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. When do you intend to make that offer?

Mr. KNUFF. We are preparing the offer at the present time, but we have not completed the writing of it. We want to make that offer in rather careful form.

Justice STEPHENS. Surely.

Mr. KNUFF. We could, in a more or less haphazard way, make it most any time, but we want to be very careful about that.

Justice STEPHENS. The Court is not assuming to hurry you. The Court only makes the inquiry because apparently a large number of these objections are going to accumulate, and since we cannot rule on them until you have had an opportunity to make your offer, it may be that the record will be somewhat dispersed, if that is the correct word.

Mr. KNUFF. We will make it at the earliest possible date, probably the first day after the Court reconvenes in January.

Justice STEPHENS. The Court would suggest to counsel who make these objections that in reading the record they make a careful note of their position in the record so that when we get to the point of the offer, you can aid the Court in placing the various objections, so that the record may be made entirely clear.

Mr. FINCK. We will, your Honor.

Justice STEPHENS. The objection may be recorded, and the Court will defer its ruling until the offer of proof on this subject is made by the Government.

Mr. FINCK. If the Court please, it would be very helpful to us if we could have some indication as to the Government's position before we leave here for the holidays, so that during the interim before our next proceedings we can meet such objections as the Government might have.

Justice STEPHENS. Are you going to file a written memorandum, Mr. Knuff?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. Perhaps you can send a copy of that to defendants' counsel early after the recess, so that they can have a chance to look it over.

Mr. KNUFF. Yes, we will.

Justice STEPHENS. I mean by that, early after 2245 the adjournment, I don't mean after the completion of the recess but early after the adjournment. Judge Jackson thought I hadn't made myself clear.

Mr. KNUFF. I understand what you mean, your Honor.

Justice STEPHENS. Is there any objection to Exhibit 300?

Mr. BROMLEY. I think that the same objection should be made to Exhibit 300, I don't see how they can be separated.

Justice STEPHENS. The Court calls your attention, Mr. Finck, to the fact that Exhibit 300 has no meaning except in connection with 300-A, and therefore perhaps, to protect your record, if you object to 300-A, and 300 will receive any meaning that it has in connection with that, perhaps that ought to be included within your objection. It is immaterial, of course, to the Court.

Mr. FINCK. I think that is perhaps a better way to handle it.

Justice STEPHENS. Objection may be recorded on the part of National to Exhibits 300 and 300-A; but the Court will defer its ruling until after the Government has made its offer of proof.

Mr. BROMLEY. And may all other defendants have the objection that these two documents are incompetent and immaterial because they are not declarations of alleged co-conspirators?

Justice STEPHENS. The Court will have to record 2246 that objection also, and defer ruling until the Government makes its offer.

Mr. KNUFF. In connection with Exhibit 300-A, I particularly desire to call your Honor's attention to the next to the last paragraph on page 3:

"There are many other minor objections to the agreement as proposed, but I assume from our conversation that in the interest of harmony in the Industry, that you did not desire to have me make any objection to any matters contained in the proposed agreement", and so forth.

That is the paragraph that I particularly want to call your Honor's attention to.

Mr. FINCK. If the Court please, I think that such remarks should be stricken from the record. I think, before this is admitted into evidence, that the position of the Government counsel should not be stated in the record.

Justice STEPHENS. Well, we think that goes a little too far. Mr. Finck. We have read the exhibit, we have to read the exhibit to know what it means, and to see whether it is admissible. All three of us have read the exhibit and

noted that paragraph. Counsel is only calling attention to it as the principal paragraph upon which Government counsel relies.

The motion to strike counsel's remarks is denied.

By Mr. KNUFF:

Q. I show you what has been marked for identification as Government's Exhibit 301, the same being a letter, dated September 17, 1934, addressed to Mr. Arthur R. Black, signed by National Gypsum Company, "RFB" in pencil, vice president, and to the left of the words "vice president" appear the words, "RFBurley/B".

Will you please look at this letter and tell us whether or not you received it, sir.

A. I don't recall its receipt, but I judge from the notation in the upper left-hand corner that I did.

Q. In the upper left-hand corner of the letter appears the legend, "9/18/34", and underneath that are your initials, is that correct?

A. That is correct.

Q. Those are in your handwriting?

A. Yes, sir.

Q. And does that indicate to you that you received that letter and answered it under date of September 18, 1934?

A. That indicates that.

Justice STEPHENS: Referring to the previous objection made by Mr. Finck, the Court thinks it perhaps did not fully understand the nature of the objection and that it should, in fair protection of the rights of the defendant, make this comment.

We thought Mr. Finck's objection was directed to a matter which arose some time ago in which it was objected to reading particular portions of the exhibit into the record so that they would assume an undue emphasis. That, we ruled, was not correct.

We had thought that the objection just made by Mr. Finck to the reference contained in the next to the last paragraph of page 3 of proposed Exhibit 300-A was in that category of objections, and as the Court ruled it thought that the matter was really de minimis.

But it occurs to the Court now that Exhibit 300 is not in evidence and since it is not in evidence, the reading of the next to the last paragraph on the third page into the record gets it into evidence, and the Court will therefore indicate that that portion of the record which now con-



tains the next to the last paragraph on page 3 of Exhibit 300-A is not to be treated as a ruling by the Court that that exhibit shall or shall not be admitted, but that that ruling shall be deferred until the Government's offer of proof.

Mr. FINCK. Thank you, your Honor.

Mr. KNUFF. That was my recollection of what your Honor intended to do, but I just want to clear something up in my own mind. I believe that I have offered Exhibits 300 and 300-A in evidence, but that ruling thereon has been deferred, is that correct?

Justice STEPHENS. That is correct, you have offered 300 and 300-A, but the ruling has been deferred; the  
2249 objections have been recorded and the ruling deferred until you make your offer of proof.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Governments' Exhibit 302, the same being a carbon copy of a letter dated September 18, 1934, addressed to Mr. Ralph Burley, signed by the American Gypsum Co.—General Sales Manager, and on the left-hand side thereof appear the initials "ARB:IW"—

Justice STEPHENS (interposing). Before you answer that—have you offered Exhibit 301?

Mr. KNUFF. I was going to offer them both together, your Honor.

Justice STEPHENS. I am sorry. This is the letter of September 18?

Mr. KNUFF. That is correct, your Honor.

By Mr. KNUFF.

Q. Have you read Government's Exhibit 302, sir?

A. Yes.

Q. Is that a carbon copy of the answer that you made to Government's Exhibit 301, which is the letter of Mr. Burley dated September 17, 1934?

A. I assume that is.

Mr. KNUFF. We now offer in evidence, if your Honor pleases, Government's Exhibits Nos. 301 and 302.

2250 Justice STEPHENS. Was Exhibit 302 taken out of the files of the American Gypsum Company or National Gypsum Company?

Mr. KNUFF. The American Gypsum Company.

I don't know whether it appears clearly on the photostat—may I approach the bench?

Justice STEPHENS. Yes.

Mr. KNUFF. On the upper left-hand corner of this letter the Court will notice initials—

Justice JACKSON (interposing). That has been testified to.

Mr. KNUFF. I didn't know whether it appeared clearly on the photostat.

Justice STEPHENS. Yes, it is on the photostat.

Is there any objection except the usual objection?

Mr. FINCK. I object, your Honor, on the ground that they are incompetent and immaterial as to National, and that they have no bearing on any of the issues as between the Government and National or Baker.

Justice STEPHENS. The objection may be recorded and ruling deferred until the offer of proof on this topic has been made by the Government.

Mr. FINCK. And in the event that you rule against me, may we have the usual objection?

Justice STEPHENS. You mean the objection to their receipt as being declarations of alleged co-conspirators?

2251 Mr. FINCK. Yes.

Justice STEPHENS. The record may show that if these are received, they are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. KNUFF.

Q. I show you what has been marked as Government's Exhibit 303 for identification, the same being a letter dated February 25, 1935, addressed to Mr. Arthur Black and signed M. H. Baker, president.

Will you please look at that letter and tell us whether or not you received it? You will notice just about the words, "Office of the President", in the upper left-hand corner, there are some penciled notations. Are they in your handwriting?

A. Yes, sir.

Q. What do those notations mean?

A. "Answered 3/2/35 ARB".

Q. 3/2/35?

A. Yes.

Q. You received Government's Exhibit 303, did you not?

A. Yes.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 304, the same being a carbon copy of a letter dated March 2, 1935, addressed to Mr. M. H.

Baker, president, and signed the American Gypsum Company—General Sales Manager, and to the left of 2252 that appear the initials, "ARB:IW". Is that the reply that you made to Mr. Baker's letter to you dated February 25, 1935?

A. Yes, sir.

Mr. KNUFF. I now offer in evidence Government's Exhibits 303 and 304.

Mr. BROMLEY. And we object to these letters, if the Court pleases, on the ground that they relate to Metal A, which is a joint treatment involving zinc strips which are placed in the cracks or joints between two pieces of wall-board. There were no licenses ever granted under this invention, no sales ever made by USG to any licensees, no prices ever fixed on it, the matter has nothing to do with anything charged in the complaint; and I am under the impression that the Government thought that this related to metallized board, which it does not in any way whatsoever.

Mr. KNUFF. If your Honor pleases, this letter dated February 25, 1935, is in the same category as Government's Exhibit No. 238, the letter of Scott, Bancroft, Martin & MacLeish, and it is offered to show by this letter the state of mind or the mental attitude that the various parties had at this particular time, that is, to eliminate an undesirable competitive situation in the industry.

Justice STEPHENS. This is 303 and 304?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. Is it conceded that this is not involved in any of these transactions?

Mr. KNUFF. So far as we know it is not, your Honor, that is the Metal A is not involved.

Justice GARRETT. Is there a patent on it?

Mr. KNUFF. Yes, we are depending on this to determine the state of mind—

Mr. BROMLEY (interposing). The question of the Court was—is there a patent on it? That was the Court's question.

Mr. KNUFF. Oh, I misunderstood. I believe there is, although I am not certain.

Mr. BROMLEY. We do not know whether there was a patent on it or not; I think there was, probably.

Justice STEPHENS. We will have to send for the transcript which contains the ruling of the Court on Exhibit 238. It is not here and I want to see exactly what the Court ruled on that.

Mr. BROMLEY. It is at page 2144—

Justice STEPHENS (interposing). But we haven't that here.

Mr. BROMLEY. May I hand it up to the Court?

Justice STEPHENS. Yes.

(Thereupon, copy of transcript referred to was handed the Court.)

Mr. BROMLEY. I think it is perfectly clear that Exhibit 238 had something to do with the general license 2254 agreements, and that is why you admitted it.

Justice STEPHENS. I noticed that in reading it.

Do you wish to be heard on either side further with respect to either 303 or 304?

Mr. BROMLEY. No, your Honor.

Justice STEPHENS. Mr. Knuff?

Mr. KNUFF. Well, I believe not.

Justice STEPHENS. I think I understand the position of both counsel. It seems to be conceded that the reference to Metal A in both Exhibits 303 and 304 is a reference to a type of license agreement which was not entered into, and is not charged to have been entered into, in these pleadings. The Court thinks, therefore, that the exhibits are not admissible.

The Court thinks that they are not comparable to Exhibit 238 which was admitted. There the Court indicated that it thought the exhibit was very close to the line because it had to do with license agreements or proposed license agreements, or alleged license agreements which so it was asserted, were never entered into; but the Court let 238 into evidence because of the reference to the general license agreement.

Now it is true that there are some situations in which evidence which may have a technical remote relevancy, are nevertheless inadmissible. As Mr. Wigmore frequently phrases it, it is the rule of auxiliary policy.

Apparently what you are offering to prove here is 2255 that the defendants had a conspiracy-committing state of mind, so to speak, showing that they were in a conspiratorial attitude with respect to the licensing of Metal A, and the reasoning is that they were in a similar state of mind with respect to the agreements which are alleged to have been illegal and to have been entered into in this case.

The situation is a good deal like the situation in criminal law, where the evidence of other crimes is offered and there, subject to certain exceptions which are not ap-



plicable here, the evidence is not admitted althorugh, of course, in a technically logical sense if defendant commits one crime it may indicate that he is a crime-committing type of person and therefore lend some slight probability to the fact that he has committed another crime.

But the difficulty of admitting that type of evidence is that it raises collateral issues so that the Court would have to try out and the defendants would have to be heard upon the defense to these alleged separate conspiracies.

The Court thinks that Exhibits 303 and 304 cross the line of proper admissibility, and objection to them is sustained.

Mr. KNUFF. May I just point out what I conceive to be the reason why they should be admitted?

Justice STEPHENS. Yes.

Mr. KNUFF. Here is a letter, dated February 25, 1935, and it is just a few months subsequent to the National license of October 5, 1934, and prior to the perforated lath agreements of 1936. It seems to me to quite definitely show—which we have alleged in the complaint—that there was a conspiracy to eliminate the competitive situation in the market.

Justice STEPHENS. The Court nevertheless thinks the exhibits are not admissible and they are excluded.

By Mr. KNUFF.

Q. What is Metal A?

A. It is a perforated metal strip—

Mr. BROMLEY (interposing). I object to this as immaterial. There has been a concession on the record, as I understand it, as to what it is.

Mr. KNUFF. I am going to connect it with the gypsum industry by this witness.

Mr. BROMLEY. There isn't any doubt but what it is connected with the gypsum industry.

Justice STEPHENS. That is conceded.

Mr. KNUFF. I don't know what it is, and I want to find out what it is used for, and how it is used in the industry. I don't know what it is.

Justice STEPHENS. I say this facetiously, that it may be desirable for counsel to educate himself on the subject, but is it within the issues?

Mr. KNUFF. I think it is, your Honor. Here we have a conspiracy to fix and stabilize the prices of the  
2257 gypsum industry—

Justice STEPHENS (interposing). Stabilize the prices of the gypsum industry?

Mr. KNUFF. Yes, We say that there is a conspiracy here to stabilize the gypsum industry, including wallboard, plaster, perforated lath, metallized lath, and everything else that is in the industry. We have set that forth so clearly that "all who run may read".

Justice STEPHENS. But it doesn't include Metal A, does it?

Mr. KNUFF. That is a part of the industry.

Justice STEPHENS. Then we get into the same difficulty that we are in with respect to the offer of proof you are going to make as to whether or not you may prove items which are not charged in your complaint.

Mr. BROMLEY. The complaint has an allegation which uses the words "miscellaneous gypsum products". Being afraid of the generality of that term in the complaint, we, in the bill of particulars, asked the Government to specify, and the Court ordered them to specify, what they meant by that general phrase, and they did specify and they said that they meant by that, gypsum block, gypsum tile and Keene's cement. They never made any reference to Metal A or anything else except those three products.

Justice STEPHENS. The objections are sustained.

2258

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibits 305 and 306; Exhibit 305 being a photostat of a letter addressed to Mr. Eugene Holland under date of October 16, 1928, and signed by Arthur R. Black; and Exhibit 306 being a photostat of a letter dated October 17, 1928, addressed to Mr. Arthur R. Black and signed "President", and opposite the word "President", on the left-hand side of the letter, appear the initials, "EH W". Will you please tell us whether or not Exhibit 305 is a photostat of the letter that you wrote to Mr. Holland, and whether or not Exhibit 306 is the reply that you received from him?

A. Yes.

Justice STEPHENS. Are there any objections?

Mr. BROMLEY. I object to both exhibits on the ground that they are immaterial and irrelevant because there is no charge in the complaint which covers this subject. The only charge of the fixing of prices of plaster contained in the complaint is tied up with the license agreements, and is said to have commenced in 1929—paragraphs 103 and 104 of the complaint.

Justice STEPHENS. What is the date of these letters?

Mr. BROMLEY. They are both dated in 1928.

Justice STEPHENS. What is the Government's position with respect to these?

2259 Mr. KNUFF. The Government's position with respect to these exhibits, your Honor, is that they definitely show an attempt here to fix the prices of plaster.

Here is a letter by Mr. Black to Mr. Holland, telling Mr. Holland what the price of plaster should be in the Cleveland market. Again, in the complaint, in paragraph 44, we do say that they have entered into contracts to violate the Sherman Act, and they have conspired to violate the Sherman Act, and they have done so for many years last past previous to the filing of the complaint—clearly within the complaint.

Justice STEPHENS. Well, you are not making your argument meet the issue raised by defendants' counsel. We would like to hear you on that, that the complaint charges that the illegal agreements which you rely upon were entered into in 1929, whereas these letters relate to a date in 1928. What is your answer to that?

Mr. KNUFF. We don't contend that that is the gist of the offenses alleged in the complaint. We say that the offenses alleged in the complaint are contained in paragraph 44.

Justice STEPHENS. Well, that isn't very helpful to the Court, Mr. Knuff, because the complaint certainly does charge that a certain conspiracy was entered into in 1929, does it not?

Mr. KNUFF. Look at page 10, your Honor, of the complaint—

Justice STEPHENS (interposing). The Court has  
2260 read all of that several times recently. Where is the paragraph you were referring to, Mr. Bromley?

Mr. BROMLEY. Page 27, paragraph 103.

Justice STEPHENS. The Court will take its noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

2261 AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock, pursuant to recess.)

Justice STEPHENS. We were discussing Exhibits 305 and 306. The Court has reread the Complaint during the noon hour, and calls the attention of counsel for both the

Government and the defendants to the following paragraphs.

It calls the attention of Government counsel to paragraph 103, at page 27, which says:

"Beginning in May 1929, as U. S. G. raised and stabilized the prices of gypsum board as aforesaid, U. S. G. and its licensees concertedly raised and stabilized the prices of plaster and miscellaneous gypsum products."

In paragraph 122, the Government charges:

"Said uniform and non-competitive prices have been throughout the period of the operation of the combination, substantially higher than those prices prevailing at the time of the formation of said combination in the year 1929."

So that there is one general allegation and one particular allegation indicating that the Government fixes the combination as having been entered into and formed in 1929.

On the contrary, the Court calls the attention of counsel for the defendants to paragraph 47, in which it says:

"The combination was formed during the period between the month of September 1925 and early in the year 1930."

2262 That is inconsistent with the allegations last referred to, that is, those in paragraphs 103 and 122.

Then paragraph 54, on page 12, states:

"The period from the latter part of 1925, after U. S. G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the aforesaid litigation, expansion of these efforts into a comprehensive plan for stabilization of prices in the gypsum industry under the leadership of U. S. G. . . .", and so forth.

Then paragraph 59, at the bottom of page 13 and the top of page 14, the second sentence of paragraph 59:

"At said meetings and conferences,"—which are characterized as commencing in April 1926, in the first sentence—"U. S. G.'s proposal to license the industry as a whole under the Utzman patent and the resulting advantages of standardized production and uniform prices at stabilized levels under the control of U. S. G. were explained by Blagden and Griswold and discussed by the representatives of the companies in attendance."

Then in paragraph 74, on page 17, it is said:

"The vigorous competition of 1928 caused a revival of interest on the part of gypsum board producers in price.



stabilization for all gypsum products. Avery urged  
2263 that those companies in the industry not yet licensees of U. S. G. reconsider his proposal for an industry-wide patent licensing plan covering board with price control by U. S. G."

The Court will hear counsel on both sides briefly.

Is there anything further from the Government?

Mr. KNUFF, I would like to call Your Honor's attention also to paragraph 45 (c).

Justice STEPHENS. Yes, we have that in mind. We have in mind, of course, the general charges in paragraphs 44, 45 and 46, in addition to those that I specifically referred to, which latter have to do more particularly with the specific time alleged with respect to the commencement of the combination.

Have you anything further to say on this?

Mr. KNUFF. Nothing further, Your Honor.

Justice STEPHENS. Mr. Bromley?

Mr. BROMLEY. Our position is, if it pleases the Court, that so far as paragraph 47 is concerned, the indefinite allegation that it was formed sometime during the period between September 1925 and early in the year 1930, is made specific by paragraphs 103 and 122.

So far as paragraph 59 is concerned, I don't believe that has any relation to plaster at all, as I read it. But whatever that fact may be, it seems to me that both 59 and 74, to which Your Honor referred, are made perfectly  
2264 definite by 77 (b) on page 18, which, as you will see from the beginning of paragraph 76, talks about the the period between May 16 and May 22, 1929, and then alleges in 77 that in addition to the agreements entered into during that period, in (b) it was agreed that "U. S. G. would stabilize . . . the prices for board . . ." and "As prices for board were increased, all companies would increase their prices for plaster and miscellaneous gypsum products."

So I thought both of those paragraphs were made specific.

Finally, paragraph 54, to which Your Honor referred, at the bottom of page 12, which talks about the period from 1925 until 1930, that was called to our attention when this pleading was served, and one of the things we asked for in the bill of particulars was whether or not it was intended by that paragraph to charge any offenses other than those thereafter made specific in the complaint. And the Court ordered the Government to answer that question. The Government did answer, and said the allegations of

paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

Because I was worried about the reference to 1925 in paragraph 54,—I still thought it was made specific that it started in May, 1929,—but I asked them that definite question, whether they intended to charge any acts other than those which they specified later, and they said no, they did not, that the allegations of 54 are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint.

Justice STEPHENS. Of course, the Government is apparently relying upon these exhibits not to prove, necessarily, illegal acts charged to have been committed prior to 1929, but to prove that illegal acts were committed in 1929 and following; is that right, Mr. Knuff?

Mr. KNUFF. That is correct, based on the *Tuthill* case as we cited in our trial brief.

Justice STEPHENS. The Court is of the view that the exhibits are admissible. In so ruling, it does not intend to indicate that it does not regard as having binding force the concessions made in answer to the request for a bill of particulars with respect to the charges relied upon. It understands that these exhibits are being offered as some evidence of the charges that are actually made in the complaint.

The Court has grave doubt as to their weight, since they relate only to two persons, two parties, but is inclined to think they are technically admissible. They will be received in evidence.

Mr. BROMLEY. I assume these are received subject to the usual reservation?

Justice STEPHENS. They are received subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 305 and 306, respectively, were received in evidence.)

Mr. KNUFF. I am not sure whether I offered them or not, but since the Court has anticipated me, I will now make the offer.

Justice STEPHENS. They are received subject to the usual reservations, and for the reasons stated.

By Mr. KNUFF.

Q. Mr. Black, I show you Government's Exhibit No. 307, the same being a letter dated October 16, 1930, addressed to Mr. Charles Henning, Vice President, and signed Arthur R. Black. Will you please state whether or not that is your signature, sir?

A. It is.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 307.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Let the Court read it.

The exhibit is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2267. (The document referred to, marked as Government's Exhibit 307, was received in evidence.)

By Mr. KNUFF.

Q. I show you, Mr. Black, what has been marked for Identification as Government's Exhibit No. 308, the same being a letter dated August 20, 1934, addressed to Mr. A. R. Black, Vice President, and signed C. Henning, Vice President. Will you state whether or not you received that letter from Mr. Henning?

A. Judging from the notation in the upper left-hand corner, I did.

Mr. KNUFF. We offer in evidence, if Your Honor please, Government's Exhibit No. 308.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 308, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Black, I call your attention to the fact that the American Gypsum Company's license with USG under the Hite and Haggerty patents bears the date of 2268 November 25, 1929, and I further direct your attention to the fact that under that agreement USG was given the right to determine the price at which you might sell board manufactured under the license.

Will you state, sir, whether you observed those bulletin prices? Did you sell board and lath in accordance with the prices prescribed in the license bulletins?

A. We did, to the best of our ability.

Q. When you say you did to the best of your ability, you mean from that point on to the present time, is that correct?

A. Yes, sir.

Justice STEPHENS. What is that question? I don't quite understand it. Read the question.

(The question was read by the reporter.)

Mr. KNUFF. The point of time that the previous question referred to was the 25th of November, 1929.

Mr. ADAMS. I think we should bear in mind that in answering that question, the witness may be speaking in two capacities here. I think Mr. Oliver might raise that point, that he is talking about American, and then American's assets were later sold to Celotex.

Justice STEPHENS. That is why the Court made the interjection. It thought perhaps the witness was confused. American couldn't be selling up to the present time, because American is out of existence. Perhaps you had better bring that out.

Mr. KNUFF. That is true. Suppose I do.

By Mr. KNUFF.

Q. From 1929 up until the time Celotex took over American, did you sell board at the bulletin prices?

A. Yes, sir, as I replied. I assumed that that was what you meant.

Q. Now from the time Celotex took over American until the filing of this bill, which was on the 15th of August, 1940, did Celotex also sell board at the bulletin prices?

Mr. ADAMS. May I simply interpose a general objection there, because I am not familiar with Mr. Oliver's pleadings, I don't know whether he admitted it or he didn't. I would like to object on the ground that perhaps this witness isn't qualified to speak on that subject on behalf of Celotex, because he is only in one small territory of Celotex.

Justice STEPHENS. Perhaps you had better inquire as to whether the witness knows about the sales prices of Celotex generally, because the question is general with respect to all of their prices.

By Mr. KNUFF.

Q. In the territory that you are familiar with, which is, I take it, the Cleveland District, which comprises the greater portion of Ohio and some portions of Kentucky, did Celotex sell board at bulletin prices?

A. After Celotex took over, I didn't see the bulletins. I only acted under instructions of the managers of



the Celotex Corporation. So whether or not their sales were in accordance with the bulletins, I didn't see the bulletins and do not know.

Q. Did you have more than one sales price, did your salesmen carry more than one sales price in any one territory at any one time?

A. The only one I could speak of—

Q. (Interposing.) I am referring to the territory that you are familiar with.

A. On board, you mean?

Q. Yes, board and lath.

A. Just the one price.

Q. May I have Exhibit 143, please?

(Government's Exhibit 143 was handed the witness.)

By Mr. KNUFF.

Q. I am particularly interested, Mr. Black, in the third page of that exhibit, where it says, "Signed F.J.G.". Do you see that?

A. Yes.

Q. Do you recognize that handwriting—

Mr. BROMLEY (interposing). I object to that as incompetent and immaterial because Mr. Griswold testified that it was not his handwriting.

2271 Mr. KNUFF. I am asking this witness if he recognizes the handwriting.

Justice STEPHENS. Are you trying to impeach Mr. Griswold?

Mr. KNUFF. Not at all. Mr. Griswold stated that he did not recognize this handwriting. I want to find out if this witness recognizes it, to see whose handwriting it is.

Justice STEPHENS. What is the objection to that, Mr. Bromley?

Mr. BROMLEY. There is none at all; I misapprehended the question.

Justice STEPHENS. So did I. You may proceed.

The WITNESS. No, sir, I don't recognize it.

By Mr. KNUFF.

Q. Were you familiar with the handwriting of Mr. J. B. Davis, who was formerly associated with the American Gypsum Company?

A. Fairly so.

Q. Were you familiar with his handwriting?

A. Mr. Davis?

Q. That is right.

A. Fairly so.

Q. Would you say whether or not this is in Mr. Davis' handwriting?

A. No, I would not say it was. I don't recognize it at all.

2272 Q. I show you, sir, what has been marked for identification as Government's Exhibit 309—I don't believe your Honors have a copy of that before you and if Mr. Finck and Mr. Johnston will return the photostats of the George Brown exhibits, I will see that you get a copy of it.

Mr. JOHNSTON. For the gentleman's information, I don't have a copy of those exhibits, and I haven't had any since I returned them to Mr. Justice Stephens.

Justice STEPHENS. Are those the ones that were so unhappily lost the other day?

Mr. KNUFF. No, the other day I gave Mr. Johnston and Mr. Finck copies of the George Brown exhibits, and at the time I gave them each copies of those exhibits, I wrote on the back of my envelope, "Finck" and "Johnston". I gave them to them.

Mr. JOHNSTON. If the Court please, I am getting kind of tired of so much of this. I took those exhibits and gave them to the bailiff, and he handed them to your Honor, and I don't want any more exhibits handed to me by counsel for the Government. I am getting tired of it.

Mr. FINCK. I also turned mine in, your Honor. They were bound together and I gave them to Mr. Knuff; as I remember it.

Justice STEPHENS. Let's preserve our good nature, gentlemen. Is it this group?

Mr. FINCK. I returned the three distinct groups  
2273 to Mr. Knuff this morning.

Justice STEPHENS. Is this the group that you have in mind (indicating)? It starts off with——

Mr. KNUFF (interposing). Letter No. 1056.

Mr. FINCK. I returned those.

Mr. KNUFF. Not this morning you didn't, Mr. Finck.

Mr. FINCK. No, that is right, it was on Friday.

Justice STEPHENS. The Presiding Judge has one, but neither Judge Garrett nor Judge Jackson has any copy.

Mr. BROMLEY. I have a set.

Justice JACKSON. We haven't had them from the beginning, either. I know I haven't had them at any time.

Mr. KNUFF. I didn't indicate that your Honors did. I said that if they would return them to us I would see that your Honors got a copy of them.

Justice STEPHENS. Let me interrupt to ask what about this letter of August 20, 1934, the last of the letters in the Black exhibits?

Mr. KNUFF. If I haven't offered it in evidence, I meant to offer it in evidence.

Justice STEPHENS. I don't have any notation of a number on it.

Justice GARRETT. That is Exhibit 308.

Justice STEPHENS. Has that been acted upon?

Mr. BROMLEY. We make the usual objection.

2274 Justice STEPHENS. It may be received in evidence if the record does not show it already has been, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(Admission of Government's Exhibit No. 308 is noted on page 2564 of this transcript.)

Justice STEPHENS. In view of the difficulties over the exchange of these exhibits, the Court suggests that hereafter, Mr. Knuff, in accordance with the promise of the Government that it will hand to the defendants for their use during the evening the series of exhibits to be introduced the following day, that you hand such exhibits to Mr. Grover, the court reporter, or his assistant, Mrs. Gillette, and let her distribute them to the defendants' counsel. Then let defendants' counsel give them back to Mrs. Gillette, and then we will not have these charges and counter-charges, I hope.

Mr. KNUFF. I will be very happy to do that.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit No. 309, being a letter dated January 25, 1929, addressed to Mr. George M. Brown and signed "CHAIRMAN", and to the left of the word "Chairman", is the name, "Jno.A.Kling". You will notice, sir, on the bottom of that letter there appears the name of "Mr. J. B. Davis". Do you recognize that handwriting?

2275 A. I do not.

Mr. KNUFF. You may cross-examine the witness.

Justice GARRETT. Then this is not offered?

Mr. KNUFF. Not at this time, your Honor.

## CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Mr. Black, you had nothing to do with the negotiations leading up to the taking of any license by American, did you?

A. No, sir.

Q. And in 1929, those negotiations on behalf of American were handled by Mr. Kling, were they not?

A. Principally.

Q. And Mr. Kling dealt chiefly with Mr. Avery, didn't he?

A. To the best of my knowledge he did.

Q. Will you look at Exhibit 203, please? Referring to the first paragraph of Exhibit 203—

Justice STEPHENS (interposing). Just a minute until the Court locates that exhibit. I have it now, proceed. Which paragraph are you inquiring about now?

Mr. BROMLEY. Paragraph 1, the first paragraph.

Mr. KNUFF. Will you just suspend until I get that letter, Mr. Bromley, please? All right, I have it.

By Mr. BROMLEY.

Q. Referring to the first paragraph of Exhibit 2276 203, Mr. Black, did you go to New York for the specific purpose of meeting with Mr. Ebsary and the others to talk about licenses?

A. Not that I recall, sir.

Q. Isn't it the fact that you were in New York because there was a slated meeting of the gypsum association which you desired to and did attend?

A. I don't remember that distinctly. As a matter of fact, I don't remember just why I was in New York. It may have been as you say.

Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Mr. Ebsary and the others to talk about licenses?

A. I had no authority, either from Mr. Kling nor the company, to discuss these negotiations or to further negotiations regarding any license.

Mr. KNUFF. We move to strike out the answer of the witness as not responsive to the question. He stated he had no authority, and—

Justice STEPHENS (interposing). The Court has already ruled that where answers are not responsive it is only the examining counsel who can move to strike. If you have some other objection, such as that it is immaterial or



incompetent or irrelevant, you may urge that, the Court several times, in the reverse situation, when defendants' counsel were objecting to answers as not responsive, overruled the objection because, as this Court 2277 has ruled, that objection lies only in the mouth of examining counsel for the reason that he can make it responsive by asking another question.

Mr. KNUFF. Then I shall amplify on the objection and object on the ground that the answer of the witness states a conclusion.

Mr. BROMLEY. It is one of those conclusions which the law regularly permits witnesses to make.

Justice STEPHENS. Well, it isn't quite that kind of a conclusion, Mr. Bromley. If there is any contention or issue here as to whether this witness was or was not authorized, he would have to state, I suppose, what his duties were and the evidences of his authority would have to be introduced so that the Court could conclude whether he had authority on that subject.

The objection is sustained on that ground alone. The answer is not responsive, of course.

I should think it would help the examination forward if counsel should ask for a responsive answer.

Mr. KNUFF. Did your Honor indicate that the answer should be stricken? You said that the objection was sustained.

Justice STEPHENS. The Court said that the objection was sustained. The Court treated the motion to strike as an objection to the question upon the ground that it called for a conclusion.

2278 Read the question to the witness.

(Thereupon, the last question was read by the reporter.)

Justice STEPHENS. My colleagues inform me that they disagree with my ruling with reference to its being objectionable as a conclusion, and the majority of the Court being of that view, the motion to strike is denied.

Justice GARRETT. I would be glad to know where we are now with that question and answer. I don't think the answer was responsive, but that of course, as the Presiding Judge correctly ruled, was not a matter for the Government to objection to. But I would like to hear that question and answer now and see where we are on this.

Justice JACKSON. I think the question is perfectly clear and susceptible of a responsive answer.

Justice STEPHENS. Can you find the question and answer and read them?

(Thereupon, the question and answer referred to were read by the reporter as follows:

"Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Ebsary and the others to talk about licenses?

"A. I had no authority, either from Mr. Kling nor the company, to discuss these negotiations or to further negotiations regarding my license.")

Justice STEPHENS. Let me explain to you, Mr. 2279 Black, that sometimes it is very natural for all of us, when we are asked a question, to, instead of answering the question, give some reason as to what we think would support it, support an answer, one way or the other. But here we have to confine our answers pretty strictly to these questions so far as you can fairly do that, and all you are being asked now is the following question.

Read that question again. You are not being asked what your authority is, you are being asked what your recollection is as to the purpose of your visit.

(Thereupon, the question referred to was reread by the reporter as follows:

"Q. Well, isn't it your best recollection now, sir, that you didn't go there for the specific purpose of meeting Ebsary and the others to talk about licenses?")

The WITNESS. If it is a matter of my best recollection, your Honor, I didn't go there. However, that is a number of years ago, fifteen.

Justice JACKSON: Did anybody hear the answer?

Mr. KNUFF. I didn't.

Justice STEPHENS. Read it.

(Thereupon, the last answer of the witness was read by the reporter.)

By Mr. BROMLEY.

Q. When you say you "didn't go there", you mean 2280 that you didn't go there for the specific purpose of meeting with Mr. Ebsary and the other gentlemen to talk about licenses, don't you?

A. That is correct.

Q. As a matter of fact, Mr. Black, you have no recollection of what occurred at your meeting in Ebsary's room, except that the general subject of settling the outstanding litigation and taking a license was discussed, isn't that right?

A. That is correct.

Q. Now did you ever, yourself, go to Chicago and meet with Mr. Avery or anyone else as a result of this conference in Ebsary's room?

Mr. KNUFF. Just a moment, please. The question is objected to as not being proper cross-examination. We didn't ask this witness whether he went to Chicago or whether he didn't. The only thing we asked this witness concerning Exhibit 203 was as to the identification of his signature. Now I have some cases almost exactly on that point, your Honor, in connection with that.

Justice STEPHENS. The Court will hear you, of course, but since this objection has been raised before, the Court will state its understanding of the law with respect to that subject, and then if you disagree you can enlighten the Court further. But the Court has gone into this subject a great deal in this jurisdiction.

2281 The leading case in this jurisdiction in recent years is *Lindsey v. United States*, 133 Fed. (2d) 368, 77 U. S. Appeals, D. C. 1 (1942).—I have forgotten the Fed. (2d) citation. That case states the law. The Presiding Judge in this Court wrote the opinion.

In some courts cross-examination may be had on all the issues charged in the case. In the Federal courts the scope of the cross-examination is limited to the direct examination. But a very clear distinction has to be drawn between the extent and the nature of cross-examination, and the fact of cross-examination.

Some cross-examination is a matter of right, that is the right to cross-examine the witness to the extent that he has been called upon to testify to facts adverse to the examining counsel, is a matter of absolute right under the decisions of the United States Supreme Court.

The extent of it is a matter in the discretion of the Court.

Now so far as the scope of the examination is concerned, the scope of cross-examination under the Federal rules is not limited to the mere literal statements of the witness. It includes subjects and facts connected with the direct examination, and it includes also the right to cross-examine upon inferences which may be drawn from the testimony of the witness.

Now we had, in the *Lindsey* case, Mr. Knuff, al-  
2282 most exactly this question. There the defendant was charged with murder, and the defense was insanity. The defendant called a doctor from a mental hospital

where this man had been confined, and put him on merely to identify the record of the hospital.

The Government thereafter sought to cross-examine that witness upon the subject of the defendant's insanity, and that was permitted because the witness, in identifying the records, had identified records which themselves were lent authenticity by his identification as an official of the hospital; and also the records indicated that he had examined this defendant.

Of course, if a witness is called merely to identify a document—for example, if a handwriting expert is called to the witness stand to identify a document, and knows nothing about its contents, and he is not offered to prove anything about the contents, and isn't examined upon the transactions to which the exhibits relate, he can't be cross-examined upon anything except his identification.

If this witness is called only for the purpose of identifying this exhibit, that objection might technically lie. But this is his own letter. In addition to that, all of these exhibits, as the Court understands it, which have been offered here and identified by this witness, relate to transactions to which he was, in one way or another, as sales manager of American, related, and as we have understood his testimony, the Government is relying upon it not merely for purposes of identification, but because it lends authenticity to the various transactions covered by these letters which the Government itself relies upon.

What is your position?

Mr. KNUFF. My position is not that the question itself is not material, or not that it is relevant. It is both material and relevant. But that is a matter of defense that should be brought out in chief, not by way of cross-examination. Whether this witness went to Chicago is a matter of defense for the defendants to show.

All I asked this witness was—is this your signature to the letter? I didn't ask him a single question concerning the letter. Now the materiality—

Justice STEPHENS (interposing). The Court hasn't been discussing any question of materiality or relevancy, the Court has been discussing your objection to it being improper cross-examination.

Mr. KNUFF. I haven't any objection as to materiality. I mention the impropriety of allowing this defense to be set up by way of cross-examination.

Justice STEPHENS. Well, that statement—and I say this with entire respect towards counsel—begs the question. The question is whether or not it is a matter of defense or



cross-examination. Do you wish to be heard, Mr. Bromley?

2284 Mr. BROMLEY. No, your Honor.

Justice STEPHENS. We are agreed that the examination is proper; objection overruled.

Mr. BROMLEY. Will you read the question, Mr. Reporter?

(Thereupon, the pending question was read by the reporter as follows:

"Q. Now did you ever, yourself, go to Chicago and meet with Mr. Avery or anyone else as a result of this conference in Ebsary's room?")

The WITNESS. To the best of my memory, I never did.

By Mr. BROMLEY.

Q. And isn't it the fact, Mr. Black, that as far as you know, no one from American ever went to Chicago to meet with Avery as suggested in Exhibit 203?

A. As far as I know, they did not.

Q. And isn't it the fact that your company didn't take a license for more than a year after the date of this Exhibit 203?

A. That is correct.

Q. And so far as you know, isn't it true, Mr. Black, that American signed its license over a year later without regard to what other board manufacturers did or would not do?

Mr. KNUFF. Just a moment, please. I again object to this question on the ground that it is attempting to introduce defense by way of cross-examination.

2285 Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. I am sorry, Mr. Knuff, but we apparently have a different conception of the proper limits of cross-examination. It seems to us—although there is some doubt on the part of Judge Garrett in respect of this particular exhibit—that the Government would rely and the plaintiff would have a right to rely—upon Exhibit 203, signed by this witness, to prove that he was a party to conferences looking toward the signing of an alleged illegal agreement, and that the cross-examination goes to the reasonableness of his testimony as a whole, including this letter which he has now authenticated. The objection is overruled.

Mr. KNUFF. May I be heard for just one second?

Justice STEPHENS. Well, yes, you may. The Court would prefer it if counsel would make their arguments before the

rulings, so as not to have to reargue them, but we will hear you again.

Mr. KNUFF. I didn't want to interrupt you while you were reading:

Justice STEPHENS. I thought you had made your argument.

Mr. KNUFF. I want to call your Honor's attention to one of the very first questions Mr. Bromley asked this witness before he asked to have Exhibit 203 shown to the 2286 witness, and that was—You had nothing to do with negotiating these agreements—and his answer was, "No".

Now then, if his answer was "no", how can he answer this question that Mr. Bromley has now asked him? The question that Mr. Bromley now asks him is—So far as you know American signed in November, 1929, without regard to what other manufacturers did? Previously he had testified, in answer to the question, "You had nothing to do with the negotiation of any of these agreements?"—and his answer was "No".

Justice STEPHENS. I am sorry, Mr. Knuff, but we do not see the point of your objection. Overruled.

Mr. BROMLEY. Will you read the question, please?

(Thereupon, the pending question was reread by the reporter as follows:

"Q.—And so far as you know, isn't it true, Mr. Black, that American signed its license over a year later without regard to what other board manufacturers did or would not do?")

The WITNESS. So far as I know, that is correct.

By Mr. BROMLEY.

Q. And further, isn't it a fact that at this meeting in Ebsary's room, there was no understanding or agreement reached that nobody would sign unless they all signed?

A. To the best of my recollection there was not.

Q. And isn't it true that there was no such 2287 understanding reached at the subsequent meeting referred to in the last paragraph on page 1, which is said to have occurred in the Certain-teed office?

A. Yes, if I understand your question correctly.

Mr. ADAMS. We all have a little difficulty hearing this witness.

Justice STEPHENS. The Court has also. Will you try to speak a little louder and also, if you do not understand the question, do not hesitate to say so. We want you to have a full opportunity to understand all questions.

The WITNESS. Thank you.

Mr. BROMLEY. Read the question and answer, please.

(Thereupon, the question and answer referred to were read by the reporter as follows:

"A. And isn't it true that there was no such understanding reached at the subsequent meeting referred to in the last paragraph on page 1, which is said to have occurred in the Certain-teed office?

"A. Yes, if I understand your question correctly.")

By Mr. BROMLEY.

Q. Now look at the last paragraph on the second page, I mean towards the last of this letter, where you say in the seventh line near the end, "and it seemed to me". Wasn't that your conclusion rather than anything that was told you by anybody, Mr. Black?

2288 A. Yes, that is entirely my own conclusion.

Q. And the next part of that sentence, "and I am inclined to think that he reports"—isn't that likewise just your own conclusion?

A. Entirely.

Q. You had no information as to whether he reported to USG or not, did you?

A. None whatever, sir.

Q. Or no knowledge of whether he did or not?

A. No, sir.

Q. Now will you refer to Exhibit 299, please, sir? Exhibit 299 was written, of course, before American executed or accepted any license from USG at all, was it not?

A. Yes, sir.

Q. The reference in the first sentence of the second paragraph to USG's refusal, was a reference to the position which USG took with respect to some clause in the proposed license agreement, was it not?

A. Yes, sir.

Q. Now isn't it the fact that the only question about jobbers, so far as the license agreement was concerned, was whether or not the licensee was to be permitted to give them a discount?

Mr. STEFFEN. If you know.

2289 The WITNESS. That is correct, because without a special clause permitting the discount to jobbers, they would pay the same price as any other dealer.

A. By Mr. BROMLEY.

Q. There was no prohibition either in the license nor

as a result of any understanding outside of the license, which prohibited American from selling jobbers; was there?

Mr. KNUFF. That portion of the question that asks the witness' construction of what was in the license is objected to.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Well, since the question is phrased to ask what was in the license, that portion of it, we think, Mr. Bromley, is not proper.

You can ask, as the Court ruled the other day, what this witness' understanding as to the meaning and effect of the agreements was, as bearing upon the reasonableness of his testimony as a whole. But the objection to the question as phrased is sustained.

2290 Mr. BROMLEY. Will the Government now concede that there is no provision in the November 25, 1929 license with American which prohibits American from selling to jobbers?

Mr. KNUFF. I think that is something that the Court will have to determine later on.

Justice STEPHENS. Is the agreement in evidence?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. How can there be any question about it unless there is some question of the construction of the agreement?

Mr. BROMLEY. I didn't see how there could be, and I thought that perhaps the Government would concede it to help me along.

Justice STEPHENS. Well, apparently it is not conceded; proceed.

By Mr. BROMLEY.

Q. Isn't it a fact that subsequent to November 25, 1929 your understanding is that there was no prohibition in the U.S.G.—American license, against your company selling to jobbers?

A. That is correct.

Q. And you did sell jobbers subsequent to November, 1929, didn't you?

A. Yes, sir.

2291 Q. And wasn't it your understanding, likewise that under the license U.S.G. had the same right to fix your price to jobbers as it had to fix your price to dealers?



A. Well, they had, according to my understanding of the license, the right to fix those prices.

Q. And when you say "prices" you mean prices to jobbers as well as prices to dealers?

A. That is correct, sir, the two prices.

Q. And isn't it the fact that for a while they fixed the jobber price at the dealer price less a discount, and later on they fixed the jobber price at the same figure as the dealer price?

A. That is correct.

Mr. ADAMS. If the Court please, I think I should say here, according to my recollection of Mr. Oliver's opening, that he takes a special position as far as Celotex is concerned. The witness happens to be testifying in somewhat of a dual capacity and I think it should be understood that he is testifying here as a former employee of American and not, in answer to these questions, in his capacity as an employee of Celotex, which is entirely different from that in which he worked for American. I take it that Mr. Bromley intends to make that clear.

Mr. BROMLEY. I will proceed to do so.

By M. BROMLEY.

Q. Your answers with respect to jobber prices were intended to relate only to what American did, were they not?

2292 • A. That is correct.

Q. Will you refer, Mr. Black, please, to Exhibits 305 and 306? Exhibit 305, your letter to Holland, refers to the plaster market in the City of Cleveland, Ohio, does it not?

A. Yes, sir.

Q. At the time you wrote this letter was the American Gypsum Company supplying plaster to customers in Cleveland?

A. Yes, sir.

Q. And what can you say about the size of the business which you had in plaster in Cleveland at about this time—was it substantial, or otherwise?

A. Quite substantial.

Q. Where was the mill which manufactured the plaster which was shipped to Cleveland customers of the American company, located?

A. Port Clinton, Ohio.

Q. How far away from Cleveland?

A. 75 miles by automobile; 65 miles by rail.

Q. And were there any other of the defendants which had a mill located close to Cleveland that were supplying the Cleveland plaster market, as well as you?

A. Yes, sir.

Q. What company or companies?

A. The United States Gypsum Company.

Q. Where was its mill?

2293 A. At Gypsum, Ohio.

Q. How far away was Gypsum, Ohio, from Cleveland?

A. Seventy-four miles by automobile, and 64 miles by railroad.

Q. So that from the standpoint of freight rates the American and the USG enjoyed a preferred position so far as supplying plaster to customers in Cleveland was concerned?

A. That is correct.

Q. And that preferred position was over and above all other plaster manufacturers, at least defendants in this case, isn't that so?

A. Yes, sir.

Q. Now up to the time of this letter, or thereabouts, had the Universal Company done any plaster business in Cleveland?

A. To the best of my recollection they had not.

Q. Where were its plaster manufacturing mills located at that time?

A. The closest one was near Akron, New York.

Q. Which was how many miles away from Cleveland?

A. Approximately 225 miles.

Q. Now, sir, how did you come to write Exhibit 305? Had you received an inquiry from Mr. Holland or did you write it as a voluntary act?

A. I do not recall just how I came to do it. The only thing I can base it on is the assumption that Mr.  
2294 Holland had inquired from me what our price was on plaster in Cleveland.

Q. And was it the purpose of your letter merely to respond to his inquiry and give him the information which he requested about your prices in Cleveland?

A. That is correct, sir.

Q. And where did you get the information which you refer to in the second paragraph when you say "It is my understanding the other Gypsum Companies" and so forth?

A. The only sources of information that I had were our own sales representatives in that territory, and information obtained from our customers.

Q. Was it customary in the business at that time, and indeed still, for your sales representatives to get what information they could from their customers as to the prices which your competitors were charging dealers and customers generally?

A. Yes, sir.

Q. And is that the way, and the only way, in which you got the information which you transmit to Mr. Holland in the second paragraph of Exhibit 305?

A. The information obtained from our representatives, as well as the information I obtained personally.

Q. Now did you intend by your letter, Exhibit 305, to solicit from Mr. Holland any agreement as to what he or your company should or should not charge for plaster?

2295 A. No, sir.

Q. Did he ever, orally, or in writing, seek to reach an understanding with you as to what either he should charge in Cleveland, or you should charge in Cleveland, for plaster?

A. He never did.

Mr. KNUFF. We would like to have a continuing objection, Your Honor—

Justice STEPHENS (interposing). To this line of cross examination?

Mr. KNUFF. Yes, on this particular exhibit, Your Honor.

Justice STEPHENS. The objection is overruled and the record may show that this line of examination is objected to.

The Court would say—and I make this statement only for the purpose of indicating the nature of the Court's ruling for the guidance of counsel in the hope of saving time with respect to future questions—that it seems to us, Mr. Knuff, that these exhibits clearly illustrate the propriety of this type of examination. You are offering them in evidence to prove—under the authenticity of this witness who signed this letter now under examination—a price-fixing agreement in 1929. These are the very exhibits which we were considering during the noon hour. It seems to us that it would be clear error to deny the right of cross examination as to the meaning of these exhibits. The objection is overruled.

We will take the afternoon recess at this time.

2296 (Whereupon a short recess was taken, after which the hearing was resumed.)

Justice STEPHENS. Proceed, gentlemen.

2297

By Mr. BROMLEY.

Q. Prior to the time that you wrote your letter, Exhibit 305, it is a fact, isn't it, that neither Mr. Holland nor the Universal Company had any salesmen operating in the Cleveland area?

A. To the best of my recollection they did not.

Q. Now look at Exhibit 306, which is Mr. Holland's reply. Isn't it the fact that that closed the matter, and that you never had any other discussions or correspondence with Mr. Holland about this subject?

A. As far as I remember, that closed it.

Q. And isn't it true, Mr. Black, that neither at this nor at any other time did you ever have any understanding or agreement with Mr. Holland or the Universal Company about plaster prices in Cleveland or elsewhere?

A. I never did.

Q. And isn't it a fact that all there was to this incident was the fact that Mr. Holland's company was coming into a new market with which he was unfamiliar, and he desired to find out what the prevailing market price in that territory was?

A. I assume, Mr. Bromley, that that is correct. My recollection at this time is not definite on that point, but my assumption, judging from the correspondence, is that that is correct, that he was just contemplating coming in there and wanted information.

2298 Q. And all you did, all you intended to do, was to give him that information as to what the prevailing price was, isn't that so?

A. That is so, yes, sir.

Q. Now referring to the subject of metallized board, did there come a time in 1934, or thereabouts, when gypsum board and lath generally commenced to meet a new form of competition in the products known as insulating products?

A. Yes, sir.

Q. What were some of the insulating products which commenced to come on the market in 1934 or thereabouts, which were in competition with gypsum lath and gypsum wallboard?

A. The principal insulating products had come on the market several years before, and was manufactured in Louisiana by the Celotex Corporation.

Q. What was it?

A. It was made out of sugar cane fiber, and had been exploited very vigorously by them, and they had large sales of it.



Q. What was it called?

A. They simply called it insulation board, although they manufactured it in a number of different forms.

Q. Well, now, were there other insulating products, like Rock Wool, which also had a competitive effect on gypsum lath and wallboard?

A. Yes, sir.

Q. And can you tell us whether or not you felt, in 1934, that there was a need in the gypsum board industry for the development of gypsum board which possessed some kind of insulating qualities which could be emphasized to meet the competition of this other material?

A. Yes, sir, I felt the need of it very strongly.

Q. At the time of which you speak, Celotex, of course, was not in the gypsum industry at all, was it?

A. Not to my knowledge.

Q. And no company defendant in this suit manufactured any of these insulating products of which I speak, do you know about that?

A. No, Mr. Bromley, I can't answer that positively for the reason that some of the gypsum companies built insulation board mills, and I don't know the exact year in which they built them.

Q. I see. But the fact is that you felt if you could get an insulating quality to gypsum board, it would maintain its sales position, or increase it, with relation to insulating products of a different character; isn't that right?

A. That is right, sir.

2300 Q. And isn't it a fact that Mr. Henning, of the USG Company, felt very strongly that you gypsum board manufacturers should get behind this new insulating product which was called metallized or foil board?

A. He did.

Q. And did you agree with him that it would be a good thing for your company to enter the field of marketing foil or metallized board?

A. I did, because it added to the insulation features of gypsum board, we were told.

Q. Now your company, the evidence shows, took a metallized board license. Can you tell the Court whether or not it was the expectation of your company to enter into the manufacture of this new product called metallized board?

A. Yes, sir, it was our expectation.

Q. And did you thereafter proceed to manufacture the product, that is, after you took the license?

A. Yes, sir, we manufactured it.

Q. Did you at any time, Mr. Black, ever have any agreement or understanding with USG or any other licensee to raise or fix or stabilize the prices of plaster or other unpatented gypsum products?

A. No, sir.

Q. And you knew, did you not, at all times subsequent to 1909, that the license agreements which your 2301 company had related only to patented gypsum board, in so far as their price-fixing provisions were concerned?

Justice STEPHENS. You said 1909. I think you meant 1929.

Mr. BROMLEY. 1929, thank you, sir.

The WITNESS. Yes, sir, I did.

By M. BROMLEY.

Q. And isn't it a fact that there was no agreement or understanding between your company and USG or any other licensee, having anything to do with price fixing of anything other than patented board manufactured by your company under the license?

A. That is correct, sir.

Q. Will you look at Exhibit 307, please? At the time you wrote Exhibit 307, which is dated October 16, 1930, your company was a licensee of USG under the license agreement of November 25, 1929, was it not?

A. Yes, sir.

Q. Isn't the reference in the first paragraph, the first sentence in the 5th line, to, "your letter, making the price on Seconds the same as Firsts, was dated April 7th . . ." a reference to a price notification sent out by USG under your existing board license?

A. Yes, sir.

Q. And wasn't it your understanding that under 2302 that license, USG had the right to fix your price on seconds as well as No. 1 or first-grade board?

A. It was.

Q. Wasn't it your understanding that there was no provision in that license which prohibited your company from selling seconds if you wanted to?

A. That is correct, sir.

Q. And isn't it a fact that there was no understanding or arrangement between your company and USG by which you agreed not to market seconds?

A. There was no understanding, sir.

Q. And isn't the reference in the first paragraph of Exhibit 307 merely to the fact that on April 7, 1930, the licensor, acting under the license, had set the price for seconds at the same figure as it had theretofore set for first-grade board?

A. That is correct, sir.

Q. You said in your direct-examination that prior to 1929, as I recollect, there was keen competition in the gypsum industry?

A. Yes.

Q. Isn't it a fact, Mr. Black, that at all times subsequent to 1929, as well as prior thereto, there has been keen competition in the gypsum industry, and particularly in the gypsum board industry?

2303 A. At all times.

Q. You told the Court, as I understood you, that after you took the November 25, 1929, license, you sold gypsum board in accordance with USG's price bulletins, at least from and after November 25, 1929..

Isn't it the fact that these sales to which you refer are sales of such board as was manufactured by your company under the patents licensed to you by USG?

A. Yes, sir.

• Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any cross-examination by other defendants?

(No response.)

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. I think about two questions, Your Honor.

Justice STEPHENS. Proceed.

#### REDIRECT EXAMINATION

By Mr. KNUFF.

Q. With reference to the price of seconds that is mentioned in Exhibit 307, could you sell seconds for the same price that you sold No. 1 board?

A. Do you mean, may I ask, Mr. Knuff, if we were permitted by our license contract to do that, or was it a matter of being able to sell the trade?

Q. Being able to sell the trade, sir.

2304 A. No, sir, they didn't care for seconds when they could get firsts at the same figure.

Q. Now you testified that there was keen competition in the industry, in response to some questions of Mr. Bromley's; is that correct?

A. Yes, sir—witness my gray hairs.

Q. And with reference to board, was there any price competition, or was all board sold at the same price?

A. No, there were different kinds of board—

Q. (Interposing.) I mean  $\frac{3}{8}$  inch board of a particular dimension, was that sold at the same price by USG, American, National, and all the rest of them? For a particular type of board having particular dimensions, was there any price competition between the various companies?

A. Naturally I could only speak for the territory that we covered, Mr. Knuff, which, for the American Gypsum Company, was rather limited as compared with the other larger companies. But in that particular territory, our prices were quite uniform on the same type and class of board.

Q. Well, weren't all other prices uniform under the price bulletins?

A. To the best of my information.

Q. So that on a particular type of board, at a particular time, there wasn't any price competition?

A. Not to my knowledge, as I interpret your question.

2305 Mr. KNUFF. Will you read the last question that Mr. Bromley asked the witness:

(The question was read by the reporter as follows:

"Q. You told the Court, as I understood you, that after you took the November 25, 1929, license, you sold gypsum board in accordance with USG's price bulletins, at least from and after November 25, 1929.

"Isn't it the fact that these sales to which you refer are sales of such board as was manufactured by your company under the patents licensed to you by USG?"

Mr. KNUFF. The question is objected to because it calls for a conclusion.

Justice STEPHENS. Read the question again.

(The question was again read by the reporter.)

Justice GARRETT. Just how, if I may interrupt you a moment, does that call for a conclusion?

Mr. KNUFF. This man isn't a production expert, he is a salesman, he doesn't know how the board was made.

Mr. STEFFEN. He doesn't know what the patents were. And Mr. Bromley knew he didn't, too.

Mr. BROMLEY. What does that mean?

Justice STEPHENS. The Court wishes counsel could refrain from personalities. It only impedes the fair progress of the case.



Well, technically the question is probably objection. Of course, there is no objection to the question.

The question has been asked and answered. All you can do now is to move to strike it. We will take your objection as a motion to strike. It may be stricken.

You may seek to obtain the information in another way, Mr. Bromley, if you can.

Mr. KNUFF. That is all the re-direct-examination I have, Your Honor.

#### RECROSS EXAMINATION

By M. BROMLEY.

Q. You understood, didn't you, at all times, Mr. Black, that the only prices of American's fixed by USG were the prices of board manufactured by you under the patents licensed to you by USG?

A. Yes, sir, that was my understanding.

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. No, Your Honor.

Justice STEPHENS. Is this witness to be excused now?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Thank you for coming here. You may be excused.

The WITNESS. Thank you for your consideration.

(Witness excused.)

Mr. KNUFF. Mr. C. F. Miller!

2307 Thereupon, C. F. MILLER, called as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name is C. F. Miller, is that correct?

A. That is correct.

Q. Where do you live, Mr. Miller?

A. Cleveland Heights, Ohio.

Q. With what business are you connected at the present time?

A. The Darlington Brick & Mining Company.

Q. And how long have you been connected with that company?

A. Oh, a matter of 26 years, perhaps more.

Q. Were you ever connected with the American Gypsum Company?

A. I was.

Q. When did you first become associated with that company?

A. At the time of its organization.

Q. That was in about 1904, is that correct?

A. I think it was about 1907 or 1908.

Q. 1907 or 1908?

A. Yes.

2308 Q. And were you active, from its inception, in the management of that company?

A. No, sir.

Q. Did you at any time become active in the management of the American Gypsum Company?

A. Yes, sir.

Q. Were you always on the Board of Directors of the American Gypsum Company?

A. Except for a short term.

Q. When was that, Mr. Miller?

A. About 1928.

Q. For how long?

A. Several months, I couldn't tell you exactly.

Q. Then from 1907 to the time American Gypsum Company sold to Celotex, with the exception of a short period in 1928, you were always on the Board of Directors, is that correct?

A. That is my recollection, yes, sir.

Q. Do you recall when Mr. Griswold was the General Manager of the company?

A. Pardon?

Q. Do you recall when Mr. Griswold was the General Manager of the company?

A. I know he was General Manager for a term of years, yes.

2309 Q. Do you recall when Mr. Griswold ceased to be General Manager?

A. Sometime about 1927 or 1929.

Q. I think it was sometime in 1929.

After Mr. Griswold ceased to be associated with the American Gypsum Company, did you take a more active part in the management of the company?

A. Not for a year or two.

Q. When did you first start to take a very active part in the management of American Gypsum Company?

A. In 1932.

Q. In 1932?

A. Yes.

Q. And what was your title at that time?

A. I had no title in 1932.

Q. Well, you have indicated that you did take a more active part. Now in what capacity did you do that?

A. I was requested to go in and see what could be done towards stopping the losses that were occurring, to make a survey.

Q. You were requested by whom?

A. By Mr. John A. Kling.

Q. And did you become the General Manager?

A. I did.

Q. And how long did you hold that position?

2310 A. From February 1, 1933, until the Celotex took us over.

Q. You were, of course, familiar with Mr. Kling, who was Chairman of the Board of Directors in the late 20's and the early 30's, were you not?

A. I was acquainted with Mr. Kling, yes.

Q. And how long had you previously been acquainted with Mr. Kling?

A. Since about 1900.

Q. Mr. Kling was associated with the American Gypsum Company from what time?

A. From its inception.

Q. Was he always on the Board of Directors?

A. No, he was not.

Q. He was a stockholder for part of that time, and then subsequently he was elected a member of the Board of Directors, is that correct?

A. Well, he was a stockholder all the time.

Q. All the time?

A. Yes.

Q. But was on the Board of Directors only part of the time?

A. Yes.

Q. Do you recall when he became a member of the Board of Directors?

2311 A. I couldn't state definitely. Along about 1928 or 1929.

Q. And when did Mr. Kling sever his connection with the American Gypsum Company?

A. When he was killed?

Q. Do you know what year that was?

A. I couldn't state definitely. I think it was about '35 or '36.

Mr. KNUFF. We would like to offer in evidence, if Your Honor please, the answer of USG to the Interrogatory No.

23 heretofore filed by the Government, as an admission of USG, and in particular sub-paragraph (e) of that answer, which reads as follows:

"September 13, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John E. MacLeish, its attorney, J. H. McCrady, President, Frank J. Griswold, Vice-President and C. F. Miller, director, of American Gypsum Company."

Justice STEPHENS. Well, now, that doesn't mean anything to the Court, because it is an answer to an interrogatory. What interrogatory is it?

Mr. KNUFF. Interrogatory 23, Your Honor, as I recall. Justice STEPHENS. To USG?

Mr. KNUFF. Interrogatory No. 23 to USG. It states as follows:

2312 "State the dates and places of all conferences or meetings held during the period from April 1, 1926, to May 1, 1927, between your representatives and representatives of any other companies manufacturing gypsum board at that time, or any time thereafter, in any way relating to the issuance of licenses by you under any patent owned by you. State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, and the names of all other individuals present at each of said conferences or meetings; and state the substance of what was said by each person present at said conferences or meetings."

That portion—"and state the substance of what was said by each person present at said conferences or meetings",—there was an objection filed to, and the Court sustained the objection. That is, there was an objection filed to the entire interrogatory, and the Court sustained the objection as to that portion.

Justice STEPHENS. That is correct.

Now as I understand it, you are asking to read into the record only that part of the answer which is in answer to the question, "State the names of all companies represented at each of said conferences or meetings, the names of the representatives of each of said companies, and the names of all other individuals present at each of said conferences or meetings", is that right?

Mr. KNUFF. That is correct, and I am reading into the record the answer of USG, sub-paragraph (e), which is:



"September 13, 1926; Chicago, Illinois; present: Sewell L. Avery, President of United States Gypsum Company, John E. MacLeish, its attorney, J. H. McCrady, President, Frank J. Griswold, Vice-President and C. F. Miller, director, of American Gypsum Company."

Justice STEPHENS. Is there any objection?

Mr. FINCK. Only the usual objection, Your Honor.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

I am afraid I misled you, Mr. Knuff. I understood you to answer that you were only reading the answer to that portion of the interrogatory which begins with the words "State the names of all companies represented", and so forth. You are reading the answer to the entire interrogatory, aren't you?

Mr. KNUFF. I am reading the answer designated as (e) in the answer of USG.

Justice STEPHENS. Does that not apply to the whole of Interrogatory 23?

Mr. KNUFF. I don't believe it does, Your Honor.

Justice STEPHENS. Very well. You may make your own record. I was just trying to help you in the interest  
2314 of time, and I apparently have impeded rather than than helped.

Mr. KNUFF. That is perfectly all right.

By Mr. KNUFF.

Q. It has been admitted, sir, by United States Gypsum Company, that Mr. McCrady, Mr. Griswold and yourself attended a conference in Chicago on September 13, at which Mr. Avery and Mr. MacLeish were present. Do you have any recollection of that conference?

A. I attended such a conference. I don't remember the date.

Q. Was that the only conference you ever attended down there?

A. It was.

Q. Do you have any recollection of the conference?

A. Not any clear recollection.

Q. I show you what has been marked for Identification as Government's Exhibit No. 310, the same being a letter dated September 16, 1926, addressed to Mr. J. B. Davis, and signed on the second page, "C. F." Will you look at that letter and tell me whether or not those initials "C. F." are your initials?

A. They are.

Q. Would you read the letter, please? Does this letter refresh your recollection?

A. I will acknowledge that I wrote the letter, but  
2315 I don't know anything more than is stated in the letter.

Q. On the right-hand side of the letter, and apparently in black crayon, is that in your handwriting, "C. F. M."?

A. It is not.

Q. And at the bottom of the letter, in black crayon, "C. F. Miller", is that in your handwriting?

A. It is not.

Mr. KNUFF. We offer in evidence Government's Exhibit No. 310, the same having been identified by the witness.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. It is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 310, was received in evidence.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit No. 311, the same being a long-hand letter dated September 26, addressed to "Dear Jim", and ask you if you recognize the handwriting?

A. It is addressed from "Old Fort Drummond", and that is where Mr. J. B. Davis spent his summers, and I think that is his handwriting.

2316 Q. Whose handwriting is this?

A. Mr. J. B. Davis', I think.

Q. You say this is in Mr. J. B. Davis' handwriting?

A. I think it is.

Q. You were familiar with Mr. Davis' handwriting, were you not?

A. To some extent.

Q. What was Mr. McCrady's first name?

A. James H.

Q. Would you say that this letter was written by Mr. Davis to Mr. McCrady?

A. I wouldn't say without reading the letter.

Q. Would you mind reading it? Now would you say that that is a letter that was written by Mr. Davis?

A. Knowing the circumstances, I would say yes.

Mr. KNUFF. We offer Government's Exhibit 311 in evidence, if Your Honor pleases.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked Government Exhibit 311, was received in evidence.)

Mr. KNUFF. Will you let me have Exhibit 143, please?

(Exhibit 143 was handed to the witness.)

2317

By Mr. KNUFF.

Q. Will you please look at the third page of Exhibit 143 and tell us if you can, if you recognize the notation, "Signed F.J.G." Do you recognize that handwriting?

A. I do not.

Q. Is it Mr. Davis' handwriting?

A. It is not.

Mr. KNUFF. May I have Exhibit 309, please?

(Exhibit 309 was handed to the witness.)

By Mr. KNUFF.

Q. Do you notice that on the bottom of that Exhibit 309 the name "Mr. J. B. Davis" appears in pencil; do you notice that?

A. Yes, sir.

Q. Do you recognize that handwriting?

A. I do not.

Q. You don't know whose handwriting that is?

A. I do not.

Q. Did you stay with the American Gypsum Division of Celotex after Celotex took it over in—when did they take it over, 1939?

A. 1939.

Q. Were you with them after that?

A. I was.

Q. For how long?

2318 A. Until July, 1940.

Q. Do you know, sir, whether or not Celotex was selling board at Bulletin prices after they took over the American Gypsum Company?

A. So far as I know.

Q. They were?

A. Yes.

Mr. KNUFF. I think that is all the direct examination we have of the witness, Your Honor.

Justice STEPHENS. The Court will have to adjourn at this time, I am sorry to say, as we have appointments which will require that.

(Whereupon, at 4:03 o'clock, p.m., the hearing was recessed until Tuesday morning, December 21, 1943, at 10:00 o'clock).

2320 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Tuesday, December 21, 1943.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2326 Thereupon, C. F. MILLER, the witness on the stand at the time of adjournment, resumed his testimony as follows:

CROSS EXAMINATION

By Mr. BROMLEY.

Q. In 1932, did you become the General Manager  
2327 of the American Gypsum Company, Mr. Miller?

A. No, sir, in 1933.

Q. 1933?

A. Yes, sir.

Q. Did I understand that you were requested to assume that position and see what could be done towards stopping the losses that were occurring?

A. I wasn't requested to assume that position at that time. I was requested to make an investigation in 1932, but I did not become Manager until 1933.



Q. I see. Well, did you mean, by that answer which you gave yesterday, to indicate that the American Gypsum Company was losing money in 1932?

A. I did.

Q. And was it losing money prior to 1932?

A. It was.

Q. And did it continue to lose money subsequent to 1932 for some time?

A. For a year or two.

Q. Do you recall that back in August, 1926, or thereabouts, you were appointed an alternate member of a committee of the American board of directors for the purpose of deciding whether or not the company should take a license?

A. I don't recall that the committee was to decide that matter, but the committee was to investigate it.

2328 Q. I see. It is a fact, isn't it, that you were appointed, by the Board, an alternate member of that committee of three?

A. I was.

Q. And that committee was appointed by the board of directors after the Court of Appeals of the District of Columbia had decided the Birdsey-Clark interference proceeding in favor of USG, was it not?

A. I couldn't state that. I am not clear on when that decision was given.

Q. Do you remember that the Court of Appeals of the District of Columbia did render a decision in favor of USG in the Birdsey-Clark interference suit at about that time?

A. I remember that they rendered a decision, yes, sir.

Q. Do you remember that it was sometime in 1926?

A. Well, I know it was sometime along there, but I don't know anything about the dates.

Q. Well, do you remember, Mr. Miller, that as a result of that decision the board of directors of American appointed this committee of which you were an alternate member?

A. I do.

Q. Will you look at Exhibit 310, please? In the third paragraph, Mr. Miller, of Exhibit 310, do you see that you make reference to a meeting in Chicago with

2329 Mr. Avery, among others?

A. I do.

Q. And the "J. H." and the "F. J." referred to in that sentence are Messrs. McCrady and Griswold, aren't they?

A. That is correct.

Q. And it is a fact, isn't it, that the committee of which we spoke a minute ago, appointed by the board of directors of American, was composed of Messrs. Griswold, McCrady, and yourself?

A. That is correct.

Q. And this meeting which you speak about in the third paragraph is a meeting which took place as a result of your committee of three going to Chicago to confer with USG officials, isn't that right?

A. That is correct.

Q. And you three gentlemen, as indicated in the third paragraph of Exhibit 310, did have a meeting with Mr. Avery, did you not?

A. Yes, sir.

Q. Now were there representatives of any other companies present at that meeting with Mr. Avery?

A. No, sir.

Q. In the second sentence of the third paragraph of Exhibit 310, you will notice that you refer to "sessions . . . with our Attorneys, Bill Shearer, Mr. Avery 2330 and the Universal Company's Patent attorney." I

want to find out whether or not it isn't the fact that those sessions, so far as Mr. Shearer and the Universal Company's patent attorney are concerned, were separate from the meeting which you had with Mr. Avery?

A. Absolutely separate.

Q. And Bill Shearer, referred to in that paragraph, was an official of the Universal Company, wasn't he?

A. Yes, sir.

Q. Now what did you talk about with Mr. Shearer and the Universal Company's patent attorney, in the separate meeting which you say you held with them?

A. That I can not recall.

Q. Don't you recall, Mr. Miller, that you and your fellow members of the committee, and your attorneys, consulted with Mr. Shearer and his patent attorney in order to find out just what it was in the way of terms which USG was offering to Universal?

A. My recollection is rather clouded, but it is that we went to the Universal's office and had this conference in order to clear up some matters with regard to the proposed contract, license agreement.

Justice STEPHENS. Speak just a little louder, if you can.

The WITNESS. All right.

2331 By Mr. BROMLEY.

Q. Isn't it a fact that one of the things you wanted to clear up was the question of whether or not Universal had been able to get an offer of more favorable terms than you gentlemen had been able to get?

A. That was one of the things that we discussed. I recall that.

Q. In other words, you wanted to find out whether you were doing as well in your negotiations with Avery as the Universal people were doing, didn't you?

A. That is right.

Q. And you wanted to find out whether Avery was insisting, with Universal, upon the same terms upon which he was insisting with you?

A. Yes, that is true.

Q. Have you any recollection as to what you found out as a result of your discussion with Shearer and his patent attorney?

A. We found that the offerings were identical.

Q. That is to say, that Mr. Avery was insisting upon the same terms for Universal as he was for American?

A. That is my recollection.

Q. Can you remember, when you gentlemen met with Mr. Avery, that the company's general counsel, Mr. MacLeish, was with him?

2332 A. Yes.

Q. And isn't it the fact that the only discussion you had with Messrs. Avery and MacLeish involved the terms upon which USG's claims against American could be settled, and the terms of the license, if you wanted to take one?

A. That is correct.

Q. And you were told by Mr. Avery or Mr. MacLeish, weren't you, that as of that time, that is, September 1926, the claim against you for infringement damages could be settled by your company by the payment of \$50,000 in cash?

A. That is correct.

Q. Plus an agreement to take a license and pay 5 percent royalties in the future?

A. That is right.

Q. And that proposal made by Mr. Avery, you gentlemen and your board of directors rejected, didn't you?

A. That is correct.

Q. In the fifth sentence of the third paragraph of Exhibit 10, that sentence reads: "A few things have been modified, at the most objectionable things plus the payments stand."

Can you recall that one of the things you and your committee thought was one of the "most objectionable things" was the length of time the proposed license agreement was to run?

333 A. I don't recall that.

Q. Now do you recall that another of the "most objectionable things", in your opinion, was that Mr. Avery could give you no assurance as to what USG would do in the event the prices became so low that the payment of royalties worked a hardship on your company as a licensee?

A. I recall there was some discussion on that point, and that we were given no assurance.

Q. Wasn't the thing that you objected to the fact that Mr. Avery would not give you any written assurance on that matter?

A. I couldn't answer that question.

Q. Well, do you remember anything else that you referred to in your clause "the most objectionable things plus the payments stand"?

A. That is 17 years ago, and I have handled a great many matters since, and I don't recall the details of that conference.

Q. Refer to the fourth paragraph of Exhibit 310, please, Mr. Miller, which is at the bottom of page 1, and particularly the second sentence beginning, "If we lose".

Now isn't it the fact that at the time you wrote that sentence, you felt that if no settlement was made and if the infringement suit was lost by American, that American would not be able to remain in the board business  
334 for the balance of the term of the Utzman patents?

A. Well, we could have remained in the board business, but with open-edge board.

Q. And didn't you feel that for the balance of the term of the Utzman patents, your company could not successfully operate, making only open-edge board?

A. Yes, I did.

Q. The reference to the word "Master" at the end of the third line of that paragraph is a reference to what your attorney told you would follow an adverse decision against you on the issue of infringement, is it not?



A. A Master would have to check the records and determine how much damages we would have to pay, that is what I understood.

Q. Well, at any rate, subsequent to this meeting in Chicago with Mr. Avery, which your committee had in September, 1926, your company decided to go ahead and fight the litigation, didn't it?

A. It did.

Q. And you did go ahead and fight the litigation; and finally, in July, 1928, wasn't it, Judge Jones in Cleveland decided against your company and in favor of USG?

A. I couldn't testify as to the date, but I know that Judge Jones decided against us.

Q. Now will you look at this penciled note on the 2335 upper left-hand corner of Exhibit 310, and because it may be confused as to order, I would like to read it in the way that I think it was written. Do you agree with this reading:

"think over & write C.F.M. very general & do not give opinion without a full conference with all interests—Jno.

A. K. included".

Is that the way you interpret that note?

A. That is the way I read it, yes, sir.

Q. And did you understand the reference to a "full conference with all interests" to mean only all interests within your own company?

A. Absolutely.

Q. And the interests within your company were the various important stockholders, weren't they?

A. Correct.

Q. Now, sir, can you recall that after Judge Jones' adverse decision in the USG infringement suit, the American Gypsum Company undertook to make a type of closed-edge board which had some cloth inserted along the raw core, on the edges of the board?

A. I know that the American made that type of board for a while, but I don't know when it was.

Q. Well, do you recall, sir, that whenever it was, the so-called cloth-edge type of board which your com-  
2336 pany made was completely unsatisfactory to the trade?

A. I was not active in the business at that time; and I couldn't make such a statement.

Q. You told us yesterday, Mr. Miller, that so far as you knew, Celotex was selling board at bulletin prices after they took over the American Gypsum Company. Isn't it the

fact, sir, that the sales to which you referred in that answer were sales of such board as was manufactured by Celotex under the patents licensed to it by USG?

Mr. KNUFF. Just a moment, please. The question is objected to because the witness is not an expert on patent matters. He is only a sales manager, or an investigator, and the question calls for technical knowledge which this witness does not have.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. Well, the question as phrased does call for, technically, a determination by the witness whether or not the patents were being used in the manufacture of the board. You may obtain the information desired by a question phrased in another manner.

Objection sustained. We had that same question before.

Mr. BROMLEY. I am afraid my difficulty, if the Court pleases, is because Government counsel's question was so general. He said—Do you know whether Celotex  
2337 was selling board at bulletin prices after they took over American?

Well, now, a question as general as that includes so much that I don't know what he means. Price control might have been discontinued. There might have been periods in which it wasn't applicable. There might have been products to which it wasn't applicable under the bulletins. It certainly wasn't applicable under the bulletins to purchased material. It wasn't applicable to all sorts of things. Yet he throws in this general question for me to disentangle, and my difficulty is that I don't seem to be able to disentangle it, because asking this man what he understood doesn't help me any as to what he did. So what I would like to bring out from him first is, if I might, as to what he understood, and then what he did, because they have got a general question in here that covers everything—whether the board was patented and whether it was proper to control the prices on it or not. He has got this witness to say that Celotex was selling board at bulletin prices.

Justice STEPHENS. Where is that question?

Mr. BROMLEY. At the top of page 2615.

Justice STEPHENS. Well, that is a very general question. The difficulty is that it seems to me, as I am presently advised, that the fact that that question is general, while that possibly might have made that question objectionable, doesn't permit the form of question which you are

2338 now asking. The Court isn't assuming to deny the defendants the right to bring out whether the board that they were selling was the board that they manufactured. But the question, as I understand it, as it is phrased, in effect asks the witness to tell whether or not it was manufactured under the patents. And whether it was manufactured under the patents apparently is a question in issue here, the Government contending that the patents weren't used. So the objection seems to be to the form of the question, not to the substance of it.

By Mr. BROMLEY.

Q. Isn't it the fact, Mr. Miller, that when you gave that answer—Celotex was selling board at bulletin prices after they took over American—you meant that Celotex was only selling at bulletin prices such board as was manufactured by Celotex?

A. That is correct.

Mr. KNUFF. We have no objection to that at all.

By Mr. BROMLEY.

Q. And further, isn't it the fact that Celotex only sold at bulletin prices such board as was manufactured by Celotex under the patents licensed by USG to Celotex?

Mr. KNUFF. That again is objectionable, as calling for a technical knowledge which this witness does not possess.

Justice JACKSON. This witness may know that 2339 very thing. He can say, "I don't know." He may know this.

Mr. KNUFF. He hasn't been qualified, Your Honor.

Justice JACKSON. That isn't your objection, is it? You didn't say that.

Mr. KNUFF. Yes, that is our objection.

Justice JACKSON. He may be able to answer this question just as it is asked.

Justice STEPHENS. Judge Garrett suggests, Mr. Bromley, that you can properly ask what kind of board was being manufactured, whether open-edge board or closed-edge board. But we are all of the view that if the Government insists upon objecting to the question as phrased—it is just the same question as you asked a moment ago—that the objection is well taken. It is asking this witness whether or not the board that they did manufacture was manufactured under these patents, and that is a question which a person informed on the patents could answer, and not a lay witness. You may, however, qualify this witness.

It is possible that he knows. It is possible that he was informed on that subject. If you can qualify him, he can answer it.

I will be glad to hear you further if you think the Court's ruling is incorrect. But I don't quite see the answer to the Government's objection. The Government is making an issue in this case of the question whether or not these patents were really used to manufacture 2340 this board. They are contending that the board was manufactured without reference to the patents, and that the license was a subterfuge. Whether the patents were actually the governing, operative, scientific principle in the manufacture of the board, and whether the board was made in accordance with the patents, and whether the patents were discarded and it was made under some other scientific arrangement than these patents, is technically a patent question.

I should think you could bring out what kind of board this was, what its dimensions were, what the folds of the edge were, what the nature of the manufacturing process was, as a matter of fact; and then ask the Court, in examining the patents, to conclude whether or not the board as manufactured did conform to the specifications and processes of the patents. That there can be no objection to, it would seem to the Court.

But under the present issues, it does seem that the question as phrased is objectionable.

Justice JACKSON. I don't think it is a very abstruse question. This witness doesn't have to be a patent lawyer to know whether or not the board in question was made under the patent. He is a practical man. He may know it. Why don't you ask him? I don't think it requires a patent lawyer to tell you that. A layman can do it.

By Mr. BROMLEY.

2341 Q. Celotex made this light-weight foam board, didn't it, Mr. Miller?

A. Celotex made a light-weight board.

Q. Are you familiar enough with the USG patents to know whether this board was made under the patents or not?

A. I understood it was made under the patents.

Mr. STEFFEN. I ask that that be stricken.

Justice STEPHENS. I don't think that can be stricken. We have ruled consistently here that because this is cross-examination, it goes to the reasonableness of the witness'



conduct and good faith of his conduct and that of his company.

Mr. STEFFEN. If it be limited to his good faith and not to the truth of the matter asserted, all right.

Justice STEPHENS. What he understood was being done is proper cross-examination. The motion to strike that is denied.

By Mr. BROMLEY.

Q. And did you also understand, Mr. Miller, that Celotex, in the manufacture of gypsum wallboard and lath, used starch for purposes of securing adhesion between the core and the paper?

A. I did.

Q. And you know that as a fact, don't you?

A. I do.

2342 Q. And was it your understanding at all times after you were with Celotex that in manufacturing that board, using the starch, you were using USG's Haggerty patent?

Mr. STEFFEN. I object to that, Your Honor. He can testify as to the use of starch, and the next is a conclusion as to whether it comes within the Haggerty patent or not.

Justice STEPHENS. He has again only testified as to what his understanding was, not whether it came within it.

Mr. STEFFEN. And this is merely for the purposes of determining his understanding, and not as to the truth of the matter asserted?

Justice STEPHENS. That is right. It is proper cross-examination as to the intentions and purposes and good faith of the witness and his company.

Justice JACKSON. The question has not been answered.

The WITNESS. It was.

Mr. BROMLEY. That is all.

Justice STEPHENS. Any further cross-examination by other defendants?

Mr. FINCK. None, Your Honor.

Justice STEPHENS. And re-direct-examination?

Mr. KNUFF. Just a moment, Your Honor, please.

#### REDIRECT EXAMINATION

By Mr. KNUFF.

2343 Q. Mr. Miller, I believe on cross-examination you testified that your company was losing money in 1932; is that correct?

A. That is correct.

Q. There was a depression in 1932, was there not?

A. There was.

Q. And other companies were losing money in 1932, were they not?

Mr. BROMLEY. If he knows.

The WITNESS. I don't know about other companies.

By Mr. KNUFF.

Q. You knew there was a serious depression in 1932?

A. We felt it.

Q. Now you said, in reference to paragraph No. 4 of Government's Exhibit No. 310, you felt that your company, in case the decision of the court went against you, could not successfully operate and make board. Do you recall that?

A. May I have that exhibit again, please?

(Exhibit 310 handed to the witness.)

Q. It is the last paragraph on the first page of Exhibit 310, the second sentence—"If we lose we will be at the mercy of the Master. . . ."

A. How was that question phrased?

Q. The question was—in response to a question by Mr. Bromley, as to whether you felt that your company could not successfully operate and make board, your answer to that was yes. Do you recall that?

A. I do.

Q. As a matter of fact, your company did make board until 1929, and had made board from the date of this letter, 1926, to the present time, or as long as you were with the company?

A. That is true.

Q. And other companies were successfully making board, weren't they?

A. Well, we could not have profitably sold an open-edge board.

Q. You could not have profitably sold an open-edge board?

A. That is right, the trade would not accept it.

Q. The trade wouldn't accept it?

A. Yes, in competition with closed-edge board.

Q. But you didn't mean that if you were to lose this suit, you wouldn't be able to make any kind of board at all?

A. There wouldn't be any need of making board if you couldn't sell it.

Q. Do you recall whether Certain-teed was making open-edge board?

A. I do not.

Q. Do you recall whether Niagara was making open-edge board?

A. I do not. I knew nothing about the operation of any other companies at that time.

Q. But you felt that your company couldn't successfully compete in the market with open-edge board?

A. That is right.

Q. Was that your opinion or Mr. McCrady's opinion?

A. That was my opinion.

Mr. KNUFF. That is all.

Justice STEPHENS. Any re-cross-examination?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Are you through with this witness?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. You may be excused, Mr. Miller. Thank you for attending the court.

The WITNESS. Thank you.

(Witness excused.)

Mr. KNUFF. I notice it is almost time for the 11 o'clock recess—

Justice STEPHENS (interposing). We will take a recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2346 Justice STEPHENS. Proceed, gentlemen.

Mr. STEFFEN. Take the witness stand, Mr. Whittemore.

Thereupon, AUDENREID WHITTEMORE, a witness called for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

Mr. STEFFEN. Mr. Knuff will examine the witness.

Justice STEPHENS. Have we the Whittemore exhibits?

Mr. KNUFF. No, you haven't them, your Honor, I have them in my hand.

Justice STEPHENS. Thank you.

(Thereupon, three copies of the Whittemore exhibits were handed to the Court.)

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you please state your name, sir?

A. Audenreid Whittemore—A-u-d-e-n-r-e-i-d W-h-i-t-t-e-m-o-r-e.

Q. And where do you live, Mr. Whittemore?

A. Bronxville, New York.

Q. In what business are you now engaged?

A. Paper and Industrial Appliances, Inc..

Q. How long have you been with that firm, sir?

A. Since 1939.

2347 Q. Were you formerly an official of the Certain-teed Company?

A. I was.

Q. In what capacity did you serve with the Certain-teed Company?

A. Do you mean when I started or when I finished?

Q. When you finished.

A. That is the question, when I finished?

Q. In what capacity were you with the Certain-teed Company when you left that company?

A. Executive vice president.

Q. When did you start with the Certain-teed Company?

A. January 15, 1910.

Q. And when did you leave the company?

A. November 30, 1939.

Q. And since that time you have been with the other company that you are presently with?

A. Yes, sir.

Q. Who was the president of the Certain-teed Company at that time?

A. At which time?

Q. When you left the company in 1939.

A. Mr. Hartley.

Q. How do you spell that?

A. H-a-r-t-l-e-y.

2348 Q. Was George M. Brown formerly connected with that company?

A. Yes, sir.

Q. In what capacity?

A. President and chairman of the Board.

Q. In 1928, what was your position with the company?

A. First vice president.

Q. What did your duties consist of, sir, in 1928? Were you in charge of production; were you in charge of sales; were you in charge of accounting—just what were your duties?

A. I was in charge of production, and a lot of other things.



Q. It has been admitted, sir, that you were in Chicago with Mr. Brown on or about May 21, or 22, 1929. Do you recall that visit?

A. Mr. Knuff, if you will identify your questions more by other things than dates, you will help me greatly, because I try to erase dates and telephone numbers from my memory. I don't worry about such inconsequential things.

Q. Were you in Chicago with Mr. George M. Brown in 1929 for the purpose of entering into a license agreement with USG?

A. Yes, sir.

Q. Do you recall where that meeting took place?

A. I think it was at the Palmer House.

Q. Do you recall the conditions in the gypsum industry, the price conditions in the gypsum industry, just 2249 prior to Certain-teed taking the license in 1929?

A. Yes, sir.

Q. What were those conditions?

A. My recollection is that we were selling plaster at about one-quarter the price of a ton of coal, and we were selling board at somewhere between eight and ten dollars a thousand; and other items were more or less in proportion.

Q. What type of board were you selling at that time, an open or a closed-edge board?

A. An open-edge board.

Q. Were you selling any closed-edge board at all?

A. No, sir.

Q. And would you say that just previous to this meeting in Chicago there was a price war on in the gypsum industry?

A. There certainly was.

Q. Do you recall whom else you saw in Chicago at the time you and Mr. Brown went out there, and by that I mean, sir, what other persons connected with the gypsum industry did you see?

A. Mr. Knuff, it is difficult for me to remember individuals or even companies that I saw at that time; and, your Honors, I don't want to give any impression of lack of memory. It is a long time ago and I can't say.

Justice STEPHENS. We don't expect you to remember what you can't normally remember over a period of 2350 years. We all have difficulty in that same respect, and if you do not remember, you can frankly say so. If you have some recollection, give us the benefit of it.

THE WITNESS. Thank you.

By Mr. KNUFF.

Q. You remember, sir, whether there were representatives of any other board manufacturers there, without specifying them?

A. Yes, sir, there were.

Q. Can you recall any, in particular, that you saw?

A. I believe Mr. Reeb was there.

Q. He was with the Niagara Gypsum Company?

A. I think so, but I couldn't be sure.

Q. Do you recall whether or not there was a representative of National there?

A. I don't know.

Q. Do you recall whether or not there was a representative of Texas there?

A. I don't know.

Q. Outside of Mr. Reeb, you haven't any definite recollection of any other person being there?

A. I am not sure even of my recollection on Mr. Reeb.

Q. Do you recall whether or not any person was there representing Ebsary?

A. I believe Mr. Ebsary was there, but again I  
2351 am not sure.

Q. You don't want us to infer that the only persons that were at that conference were just the persons you definitely remember?

A. No, there were others, I know.

Q. Your company at that time did undertake to sign a license agreement with USG on the Utzman patent?

Mr. BROMLEY. I object to the use of the word "undertake"; I don't know what it means—

Mr. KNUFF (interposing). Probably it was an ill-phrased question.

By Mr. KNUFF.

Q. Your company did sign a license agreement with USG at that meeting, is that correct?

A. Yes, sir,

Q. And you were one of the officials that executed it on behalf of Certain-teed?

A. Yes, sir.

Q. And Mr. George Brown was the other?

A. I think so, but I couldn't be positive. The agreement will speak for itself.

Mr. ADAMS. We will agree that Mr. George Brown was the other signer.

Justice STEPHENS. The record may so show.

By Mr. KNUFF.

2352 Q. Did prices advance on board immediately following the execution of the May contract, May 1929 contract?

A. I cannot answer that question as it is put. What does "immediately" mean?

Q. By "immediately", I mean that same day or within a day or two after.

A. I can't answer that question. I think our price lists will show that.

Q. Did you expect that prices would be advanced?

A. That is another difficult question to answer. They couldn't decline any more. If they went any way they would have to advance.

Q. And do you recall whether or not prices did advance?

A. My recollection is that they did advance, but how soon I don't know.

Q. In the proposed license agreement that was subsequently signed, you knew there was a provision providing for the right of USG to fix prices, did you not, for board?

A. Yes, sir.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 312, the same being copy of a letter dated June 10, 1929, addressed to Mr. S. L. Avery, president, and signed, "President", and opposite the word "President", appear the initials, "GMB:LK".

Did you ever see that exhibit before, Mr. Whitte-  
2353 more?

A. I must have seen it because my writing is on it.

Q. Those are your initials at the top, and writing?

A. The initials, "COB—Better take this file also", and then the initials, "COB" and "LRW" scratched out, and the initials, "DCC", and, "See letter below also. AW"—is all my writing.

Mr. KNUFF. We offer in evidence, if your Honor please, Government's Exhibit 312.

Justice STEPHENS. Will you let the Court see it, Mrs. Gillette?

(Thereupon, original proposed Government's Exhibit No. 312 was handed to the Court.)

Justice STEPHENS. Is there any objection, except the usual objection?

Mr. BROMLEY. No, sir.

Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 312 was received in evidence.)

Justice STEPHENS. Do you intend to bring out who wrote the letter, if the witness knows?

By Mr. KNUFF.

Q. Do you know who wrote that letter?

2354 A. I haven't read the letter. If you will pass it back to me maybe I can get some idea.

(Thereupon, Government's Exhibit No. 312 was handed to the witness.)

The WITNESS. Well, naturally, I presume the letter was written by Mr. Brown.

By Mr. KNUFF.

Q. George M. Brown?

A. Yes.

Q. I show you, sir, that has been marked for identification as Government's Exhibit 313.

In the photostats that your Honors have before you, please skip the next four exhibits, and come to the one marked in ink "Exhibit 459", which is the one that I am now referring to.

Justice STEPHENS. That is the one you have now had marked Exhibit 313?

Mr. KNUFF. Yes, your Honor.

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 313, the same being a memorandum dated 3/13/36, "Dictated by Warren Henley" and for the attention of "Mr. A. Whittemore, V.C"—whatever that means.

A. It should be "V.P."

2355 Q. And I ask you to look at that and see if you recognize it, please.

A. That again is my handwriting at the top.

Q. Will you read the memorandum and tell us who wrote it?

Justice STEPHENS. Refresh my recollection—who is Mr. Warren Henley.

Mr. KNUFF. Mr. Warren Henley, I believe was merchandise manager for gypsum, connected with Certain-teed Products Company.

Mr. ADAMS. He had that title, if your Honor pleases, but he was not in fact the merchandising manager.



Justice STEPHENS. He was, however, connected with Certain-teed?

Mr. ADAMS. That is right.

The WITNESS. What is the question, Mr. Knuff?

By Mr. KNUFF.

Q. I just asked you to read that letter.

A. Read both the attachment and the letter?

Q. Everything that you have there, there are four pages, I believe, before you. Read those four pages.

Justice STEPHENS. Is item No. A-e-64 a part of this exhibit?

Justice JACKSON. That is the first page of the exhibit.

Justice STEPHENS. You said four pages?

Mr. KNUFF. The fourth page in my book is the reverse side of one of the pages that is written on the other side.

2356 Justice STEPHENS. There is something wrong in our exhibits. There are two pages here in the series of exhibits handed to the Court, which are marked with item No. A-e-64. That is the first long page which contains the memoranda, and handwriting which you apparently refer to; then there is another page containing certain listed paragraphs, "In favor of license"; then a page containing items under the heading "Against license", and then there is another page A-e-64.

Mr. KNUFF. The fourth page beginning with, "Your report of the 13th is most interesting", is the reverse of one of the pages before Mr. Whittemore.

Justice STEPHENS. On the back side of it?

Mr. KNUFF. Yes.

Justice STEPHENS. And that is part of the exhibit?

Mr. KNUFF. It is, your Honor.

Justice STEPHENS. Very well, I understand it now.

By Mr. KNUFF.

Q. Who was Warren Henley, sir?

A. He was called merchandise manager. He was originally with the American Cement Plaster Company, and then the Beaver Company and when we absorbed the Beaver Company he became one of our employees.

Q. And at the time he wrote this memorandum to you he was an employee of Certain-teed Products Company?

A. Yes, sir.

2357 Q. And the writing at the top of this memorandum is in your handwriting, is it not?

A. Yes, sir.

Q. And the writing on the reverse side of the first page, is that in your handwriting?

A. Yes, sir.

Mr. KNUFF. We offer in evidence, if your Honor pleases, Government's Exhibit 313.

Mr. BROMLEY. The usual objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 313 was received in evidence.)

Mr. FINCK. May I object to this on the ground that it is immaterial as to National? The memorandum refers principally to perforated lath, and I think we have a continuing objection with respect to such evidence—

Justice STEPHENS (interposing). That is correct.

Mr. FINCK (continuing)—however, I would like to have the record show it.

Justice STEPHENS. Your objection may be recorded. It will be within the group of deferred rulings which the Court will have to cover after the recess.

Mr. KNUFF. I think at this time we have hanging in the air Exhibit 296, and since 313 has now been identified, that will identify also Government's Exhibit 296.

Justice STEPHENS. Well, that is the same thing, is it not, except that it does not contain that fourth page or reverse side?

Mr. KNUFF. That is right, your Honor.

Justice STEPHENS. Do you need both of them?

Mr. KNUFF. It was used in connection with Mr. Neale's testimony. I don't think we need to use 296, but so that we don't have any exhibits that are more or less hanging, I thought I would get both of them in.

Justice STEPHENS. Is 296 in evidence?

Mr. KNUFF. I am now offering 296 in evidence. It was used to refresh Mr. Neale's recollection.

Justice JACKSON. It is identical with your present offer?

Mr. KNUFF. Practically identical.

Justice STEPHENS. It is identical except that it does not contain the handwriting referred to, and it does not contain the fourth page or reverse of one of the other pages?

Mr. KNUFF. Yes.

Justice STEPHENS. Well, if it was used only to refresh recollection, it isn't technically admissible in evidence, and

I should think it would be unnecessary to have it in the record since you already have all of it and more in, in Exhibit 313.

2359 Mr. KNUFF. Well, I raise no controversy one way or the other.

Justice STEPHENS. However, there is no objection to it before the Court.

Mr. ADAMS. We don't care either way.

Mr. BROMLEY. I object to it on the grounds just stated by the Court. I think it clutters up the record and there is no need for it.

Justice STEPHENS. It is rejected as redundant and unnecessary, since the identical material, and more, is contained in Exhibit 313 which has been admitted.

Mr. KNUFF. I take it that the ruling is that 296 is not received in evidence?

Justice STEPHENS. It is not received in evidence and the Court so ruled.

By Mr. KNUFF.

Q. I show you—

Justice STEPHENS (interposing). I am sorry, Mr. Knuff, to interrupt you, but so that the record all at one place will contain the items necessary to the explanation of any one exhibit, won't you have the witness read what the handwriting states on the top of that exhibit, unless it is quite clear in the original—I haven't seen the original. Is it clear enough so that it is legible?

The WITNESS. My writing is never legible.

2360 Justice STEPHENS. Suppose you translate that for us, as I have to do with mine.

By Mr. KNUFF.

Q. Mr. Whittemore, will you read the legend that appears at the top of Exhibit 313?

A. It has the following initials: "SCS"—

Q. (Interposing) Who does "SCS" stand for?

A. Sam C. Straub.

Q. All right.

A. "CER".

Q. Who does that stand for?

A. Chester E. Rahr.

Then "DFB".

Q. Who does that stand for?

A. Daniel Fisher Brown.

And my own initials, "AW". The first three are scratched.

The writing is, "Think the manufacturers are right in their objections to proposed license of USG, and that we should know as soon as possible what if any revision they will make in their ideas".

The initials, "AW" then appear.

Justice STEPHENS. Will you bring out what the handwriting is on the reverse side?

The WITNESS. The reverse side has following initials: CER; DFB; SCS; and AW—with the date after 2361 "AW"—3/18/36—all of the initials being scratched.

By Mr. KNUFF.

Q. What does that scratch mean, that they have seen it?

A. It meant generally that they had seen it, although sometimes initials were scratched when a letter was not read. I have done it myself. If it was an inconsequential matter, I might merely scratch my initials and not read the letter.

Justice STEPHENS. Proceed with the next exhibit. Thank you, Mr. Whittemore.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. I now show you, sir, what has been marked for identification as Government's Exhibit 314, the same being dated 3/25/36, dictated by Warren Henley, and addressed to you.

Will you please look at that, Mr. Whittemore?

Justice STEPHENS. Is that the one that starts out, "In further reference my memo. March 23, above subject"?

Mr. KNUFF. Yes, your Honor.

The WITNESS. Do you want me to identify this?

By Mr. KNUFF.

Q. If you can.

A. I cannot, I don't know whose writing that is. It is not mine.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 315, the same being a 2362 memorandum dictated by Warren Henley, dated 3/23/36, and addressed to the attention of Mr. A. Whittemore, V.C.—will you please look at that memo?

A. Yes, sir, that is my writing on the top of it.

Q. And you received that memorandum, did you not?

A. I must have, I wrote on it.

Q. The form is the usual form used by your company in inter-office communications?



A. Yes, sir.

Q. And the form of Exhibit 314, is that the usual form of a carbon of a memorandum, inter-office memorandum?

A. I will have to look at 314.

(The document marked as Government's Exhibit No. 314 was handed to the witness.)

The WITNESS. That would appear to be, yes, sir.

By Mr. KNUFF.

Q. You will notice, sir, that in Exhibit 314 it states, "In further reference my memo. March 23, above subject"—what was the "above subject"?

A. On this letter it is "perforated gypsum lath".

Q. And on Exhibit 315, what is the subject?

A. Perforated Gypsum Lath.

Q. And was that a subject that would normally come to your attention?

A. Yes, sir.

2363 Mr. KNUFF. If your Honor pleases, we now offer Exhibits 314 and 315.

Justice STEPHENS. Was Exhibit 314 taken from the files of Certain-teed?

Mr. KNUFF. It was, your Honor, taken from the files of Certain-teed, and they are connected by internal reference.

Mr. ADAMS. I don't see any objection to 315, but I am a little confused about 314. The witness stated that he could not identify it, and that the handwriting was not his.

Justice STEPHENS. Well, it is being offered under circumstantial identification as follows, that at the top of Exhibit 314 it says, "In further reference my memo. March 23, above subject", and the "above subject" is Perforated Gypsum Lath, as written on that exhibit—and that is also the subject of Exhibit 315 which bears the date March 23, 1936, and it is stated by counsel, and not denied, that Exhibit 314 was taken out of the files of Certain-teed.

It would seem to the Court that the circumstantial identification of Exhibit 314 is sufficient.

Mr. ADAMS. I may be wrong about this, but it seems to me that the mere fact that Henley wrote a memorandum to Whittemore which Mr. Whittemore can't identify at all, and the mere single fact that in that memorandum Henley says that he refers to a memorandum of March 23—

Justice STEPHENS. (interposing). On the same subject.

2364 Mr. ADAMS. On the same subject, I agree—isn't enough.

Justice STEPHENS. We think your objection goes to the weight of the identification. The record, however, may show your objection and the exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators, unless there is objection by other defendants. Do you make the continuing objection that it is not applicable to National?

Mr. FINCK. Yes, your Honor.

Justice STEPHENS. The objection may be recorded.

Mr. JOHNSTON. And I would like to make the same objection for Texas, as it applies to perforated lath.

Justice STEPHENS. That may be noted also, and ruling will be deferred on those objections.

(Documents marked as Government's Exhibits Nos. 314 and 315 were received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit 316, the same being a letter, dated October 26, 1938, addressed to William L. Keady, vice president, and signed by Warren Henley. Were you familiar with Mr. Henley's signature, sir?

A. Not very familiar with it, no.

Q. Would you say that that is the signature of Mr. Henley?

2365 A. I couldn't say positively. I think it is.

Mr. KNUFF. We offer in evidence Government's Exhibit 316.

Justice STEPHENS. Is there any objection to the identification of this exhibit?

Mr. ADAMS. I have no objection.

Justice STEPHENS. Received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. FINCK. May I also record the continuing objection of National—

Justice STEPHENS (interposing). The continuing objection of National may be recorded.

Mr. JOHNSTON. And also for Texas.

Justice STEPHENS. Yes, also for Texas—and ruling will be reserved on those objections.

(The document marked as Government's Exhibit No. 316 was received in evidence.)

Mr. KNUFF. You may cross-examine the witness.

## CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Mr. Whittemore, prior to the time that you and Mr. George M. Brown went to Chicago in May, 1929, had you decided to take a license, or not?

A. We had decided to take a license.

2366 Q. And is it the fact, then, that the purpose of your visit to Chicago which you have testified to on direct, was merely to work out the details of the contract which you had decided to make with USG?

A. It depends on what you call "details": I wouldn't call them details. We wanted to get a one million dollar bond cancelled. If that is a detail, all right.

It was for the purpose of working out a deal with USG on all matters involved including the payment of past royalties that we had not paid on board, manufactured in the Beaver plant; it was to work out how that payment was to be made and what it was to be; and it was to work out the cancellation or whatever you legally call it, of the one million dollar bond that our directors had signed personally—and anything else that came up.

Q. And also to work out the form and substance of a license agreement that would enable you to operate in the future under their patents?

A. That is right.

Q. Before going you had decided to make the best deal that you could, is that right?

A. Correct.

Q. Before you went out there, had you in hand any proposition from USG involving how much money you would have to pay, or otherwise?

A. I can't answer that question, I don't remember.

2367 Q. Did the decision which you and your president and your management made prior to your going out there, to settle and take a license if you could, have anything to do with any other company in the business, or didn't it?

A. No, sir, it did not. We were in enough trouble ourselves without worrying about the other fellow.

Q. And is it the fact, sir, that your company would have taken a license if it could have gotten it without regard to what any other company did or did not do?

A. Yes, sir.

Q. What was the attitude of your company and yourself toward whether or not you desired to manufacture the Utzman closed-edge board?

A. We wanted to make it.

Q. Will you tell the Court the reasons why you wanted to make it?

A. Well, there were a number of reasons. The board was a better board than the open-edge board; it was less subject to damage in transit because of the edge coverage by paper; it was easier to manufacture; and it was decidedly more salable.

Q. Now when you say that it was "decidedly more salable", do you include in that answer the fact that as of this time, at least, there was a strong customer demand in the trade for closed-edge board?

2368 A. Yes. If you will let me answer that question in my own way, I think I can get at what you want to develop.

Q. I wish you would.

A. The Certain-teed Products Corporation made an open-edge board. At the same time, the Beaver Products were making a closed-edge board; when we took over the Beaver Products we immediately discontinued the manufacture of closed-edge board in the Beaver plant, and went to an open-edge board. We found that the customer demand precluded our selling an open-edge board at the same price as the closed-edge board, and prices declined, declined and declined.

Q. Then would you say that the primary reason for your taking this license from USG was to get the right to manufacture the product covered by the closed-edge patent?

A. That was one reason, and also to get rid of the possibility of future litigation. You referred to the Utzman patent. The Utzman patent was only one of some fifty to one hundred patents that we were licensed to use. Some of those patents were vital in the production of closed-edge board, and had we not had a blanket license to use all of the patents of USG, we would have been subject to possible litigation, and we wanted to avoid that—we had had plenty.

Q. Now the patents to which you have just referred, in addition to the Utzman patent, were the patents which the May, 1929, license from USG to your company  
2369 covered, and they were listed on an exhibit to that license, were they not?

A. That is correct.

Mr. BROMLEY. Will you mark for me, please, a memorandum purportedly from this witness to C. O. Brown, dated May 27, 1929, as Defendants' Exhibit 8 for identification?



(The document referred to was marked as Defendant's Exhibit No. 8 for identification.)

By Mr. BROMLEY.

Q. I show you what has been marked Defendants' Exhibit No. 8 for identification. Can you identify this memorandum?

A. Yes, sir; there is a correction in that memorandum in my handwriting.

Q. Which one, sir?

A. In the paragraph under the paragraph marked "4", in the third line from the bottom, "open" is changed to "closed".

Q. So that you can identify it as a memorandum which you prepared?

A. Yes, sir,—it looks like mine anyway.

Q. And whose handwriting is it on the bottom?

A. George M. Brown's.

Q. And are those words, "this is correct"?

A. Yes, and they are written by Mr. Brown.

Q. In the next to the last paragraph, who is the 2370 Mr. Jacobs referred to?

A. I think Mr. Jacobs was a Chicago attorney who handled the final drawing of the license agreement, and the litigation for us through Cravath's office—I think, I am not sure of that.

Q. Mr. Jacobs was a member of the firm of Winston, Strawn & Shaw, was he not, at that time?

A. I think that was the firm, but I couldn't say positively.

Q. And at this time the Certain-teed Company was represented generally by the Cravath firm in New York, was it not?

A. That is correct.

Q. And the Cravath firm secured for Certain-teed the services of Winston, Strawn & Shaw to act as Certain-teed's counsel in consummating the license contract between USG and Certain-teed, did it not?

A. I think that is correct.

Q. In connection with the settlement, and the May 1929 license between USG and Certain-teed, was any suggestion made, or any understanding or agreement reached, between your company and USG, or anybody else, that USG would find a patent to continue price control upon the expiration of the Utzman patent?

A. Will you read that question, please, sir?

(The pending question was read by the reporter.)

2371 The WITNESS. Not that I have any recollection of. I am trying to clear my own mind as to when the question of the bubble patent came in, and frankly I don't remember. But I am quite sure it was not at that time.

By Mr. BROMLEY.

Q. Don't you remember that as a matter of fact there was no mention of the bubble situation until after—

A. (Interposing) That is exactly what I said, I am trying to clear my own mind as to when the bubble patent came up. I am quite sure it didn't come up at that time.

Q. Now as a matter of fact, Mr. George M. Brown, Certain-teed's president, was opposed to price control of his products being exercised by somebody else, was he not?

A. You state it mildly; he was violently opposed.

Q. And isn't it the fact that he was finally persuaded to take this license because the price control provided for in that license only lasted until August 6, 1929, when the main Utzman patent expired?

A. I don't think I can answer that question. You are asking me to answer what somebody else's opinion was, and I don't feel competent to answer that question. That certainly might have influenced his willingness to take the license, but I think there were many other considerations.

Q. Well, it occurred to me that there might be an inconsistency between your statement that he was violently opposed to price control, and his action in finally signing a contract, Mr. Whittemore, which provided for price control.

A. Look, we were up against it.

Q. What do you mean by "we were up against it"?

A. I mean that we had a million dollar bond against us, and we were going to have to pay royalties we thought, and we might as well get some benefits from them.

Q. When you say "royalties", you mean damages, don't you?

A. I mean damages and future royalties.

Q. Now in connection with your taking of the May, 1929, license, was there any understanding or agreement reached on the part of your company with anybody that prices of plaster or other unpatented gypsum products would be raised or fixed?

A. No, sir, there was never any such agreement with anybody.

Q. You understood, did you not, Mr. Whittemore, that under the agreement, the license agreement that is, of May, 1929, the only prices which USG could fix were the prices of patented articles made by your company?

A. Yes, sir.

Q. And did you also understand that USG had no right to control any price even so limited, except the price of the first sale, that is the sale by your company to somebody else?

A. Yes, sir, I fully understood that.

2373 Q. You understood, then, that USG's right to fix prices did not extend to resales by such of your customers, for instance, as dealers or manufacturing distributors?

A. Yes, sir.

Q. And it is a fact, isn't it, that you understood further that the price fixing provided for in the license was not to extend to any open-edge board unless such board came under other patents, such as the starch patent?

A. That is correct. We had little interest in open-edge board, because we had had enough of it.

Q. And you understood, did you not, Mr. Whittemore, that USG had no right to and did not fix any prices, between May 1929—I mean under the May 1929 license, between August 6, 1929, and November 5, 1929?

A. I can't remember the dates, but I remember there was an intervening period there during which time they fixed no prices.

Q. And that period was the period between the expiration of price control under the May 1929 license, and its resumption under the subsequent bubble and starch license which your company, the record shows, took out sometime in the fall of 1929, and which became effective November 5, 1929; isn't that right?

A. I can't verify the dates, but that is my understanding.

2374 Q. Was there ever any understanding between your company and USG as to what USG would or would not do with respect to the prices which it might thereafter establish under the reserved right in the May 1929 license?

A. I don't just get that. What do you mean by "reserved right"?

Q. I don't either. I will withdraw it.

Was there any commitment made by USG as to what price it would fix, once the license became effective, whether it would be high or low or what it would be?

A. There was never any agreement by USG to do anything. They were meticulous in telling you what they had done after they had done it, and not before.

Q. So they made no commitment of any kind as to any figure at which they might fix the price of board after you took the license?

A. They never made such commitments.

Q. And furthermore, isn't it a fact that they never indicated to you whether they would fix the price under the license at \$30 or \$20 or \$15 or \$10, they never made any indication as to what they would do?

A. I have already stated that they never made any commitments.

Q. And I wanted to ask you if it isn't the fact not only that they never made any commitments, but they  
2375 never made any statement with respect to what they intended to do—is that right?

A. Yes, sir, that is right. I think I answered it that way the first time.

Q. You probably did.

And is it further the fact, Mr. Whittemore, that there was no understanding or arrangement between your company and USG as to the disposition by Certain-teed of any open-edge or second-grade board which you might have had on hand at the time you signed the May 1929 license?

A. I can't answer that question. I haven't a very definite recollection, but what recollection I have is that we disposed of that board as we saw fit, without any agreements of any kind as to price or location or anything else. We just did the best we could in getting rid of it.

Q. And what can you say as to whether or not you had any understanding with USG that you would discontinue the manufacture of second-grade board or open-edge board, and would not manufacture it again after the license was signed?

A. Well, I am quite sure, although I can't answer that definitely, I am quite sure we had no agreement with USG that we would or would not manufacture open-edge board. It wasn't covered by the license.

Q. And at all times, it was your understanding that you were perfectly free to manufacture any board,  
2376 whether it was patented or unpatented board?

A. Yes, that is correct. There was no restriction on our manufacturing open-edge board if we wanted to. We didn't want to, I will say that.



Q. And you didn't want to because you felt, as you have said, that closed-edge board was so much superior; isn't that right?

A. You couldn't sell it, that was all.

Q. Let me ask you this question, Mr. Whittemore: Did Certain-teed enter into its license agreements with USG for the purpose of rigging up a price-fixing scheme, or didn't it?

A. No, sir, it did not.

Q. And was it your purpose, or the purpose of your company, in taking these licenses, to get your prices on gypsum board fixed or controlled under the color of some patent which you didn't intend to use and didn't use?

A. No, sir, we intended to use the patent.

Mr. KNUFF. Just a minute, please. We will have to enter our objection to this question for the reason that it is not cross-examination, and is a matter of defense.

Justice STEPHENS. The record may show your objection. It is overruled. The Court thinks it is proper cross-examination.

By Mr. BROMLEY.

2377 Q. And was your company induced to take these licenses by virtue of what other gypsum companies did in the premises, Mr. Whittemore?

A. No, sir. We made this agreement ourselves with USG because of the reasons I have outlined before.

Q. When you took the October 1929 license, is it the fact that one of the reasons for your taking it was because you knew you had been infringing the Haggerty starch patent?

A. Now wait, are you getting onto the starch patents now, and away from the USG original license?

Q. Yes, I am just starting.

A. All right.

Justice STEPHENS. Let the Court take its noon recess at this time.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 1:45 o'clock p.m., of the same day.)

2378

#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.  
Thereupon,

## AUDENREID WHITEMORE

the witness on the stand at the time of recess, resumed his testimony as follows:

## CROSS-EXAMINATION. (resumed)

Mr. BROMLEY. If it please Your Honor, since we do not have the record of the morning transcript, I will withdraw the last question, because I can't recall accurately what it was.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. This morning, Mr. Whittemore, you made some reference, as I recollect, in connection with your testimony as to the reasons for taking the licenses, to some benefits, without describing what they were. Do you recall that testimony?

A. Yes. I had reference to getting a product that was a better product and a more salable product than the open-edge board that we had been marketing.

Justice STEPHENS. Mr. Bromley, if it will help to refresh your recollection, just at the recess you had changed  
2379 the course of your examination to a discussion of the Hite and Haggerty patents.

Mr. BROMLEY. Oh, yes. Thank you.

The WITNESS. You were referring to the original license, were you not?

By Mr. BROMLEY.

Q. Yes.

A. That is what I was referring to.

Q. Am I correct in my understanding that the placing of price control in the licensor was not an inducement to Certain-teed to enter into the May 1929 license?

A. No, sir, it was not, and I think I have conveyed that idea by saying that Mr. Brown was bitterly opposed to price control.

Q. With reference further—

Mr. KNUFF (interposing). Just a moment, please.

We now move that the answer of the witness be stricken from the record for the reason that it is immaterial what the reasons were why they entered into the price-fixing arrangement. The Court, in the *Standard Sanitary* case, said that the Sherman Act is its own measure of right and wrong. So it is immaterial what their reasons were for entering into this license agreement.

Justice STEPHENS. Do you wish to be heard?

2380 Mr. BROMLEY. Simply to say that I thought the principal charge here was one of subterfuge as a cloak to fix prices, and it seems to me to be material to show that the price fixing didn't figure in this witness' decision to take the license, but that other good and valid affirmative reasons were the motivating forces.

Justice STEPHENS. That seems correct to the Court. The objection is overruled.

By Mr. BROMLEY.

Q. In your testimony this morning, Mr. Whittemore, with reference to the Chicago meeting, the original of your license agreement, already in evidence, shows that it was executed on May 22, 1929. Is it your testimony that that agreement was executed at this or any meeting in Chicago attended by representatives of other companies than USG and yourself?

A. There were other companies' representatives present at Chicago. Our negotiations prior to signing that agreement were individual with USG individually and not with any of the other companies who were at that so-called meeting. In other words, there was no meeting of licensees who jointly—or manufacturers, rather, who jointly signed any agreement with USG. It was entirely individual.

Q. Now, sir, did you have anything to do with the negotiations and the taking out of the November 1929 license between USG and Certain-teed?

2381 A. That is the license on the bubble board?

Q. Yes, sir, and starch.

A. I don't think I had any direct contact, but I certainly had the final decision in taking out that license.

Q. Can you give us the reasons which motivated your company in taking out that license?

Mr. KNUFF. Just in order to keep our record straight, I object to this line of cross-examination for the reason that it is going beyond the scope of the examination-in-chief—

Justice STEPHENS (interposing). Was that subject gone into on direct, Mr. Bromley?

Mr. BROMLEY. It seems to me that it was, to this extent: He has been asked about the May, 1929, meeting. It is charged that at that meeting, or rather that that was the meeting at which there was hatched a plan to get a patent to fix prices in the future. Therefore, it seems to me I am entitled to go into that subject with this witness.

Justice STEPHENS. The record may show your objection is overruled.

Mr. BROMLEY. Will you read the question, please?

Mr. KNUFF. I didn't get a chance to state my objection.

Justice STEPHENS. I understood you to say that you rose to make a continuing objection to this line of cross-examination, and that you were making your record. I am  
2382 sorry if the Court cut you off. Proceed and make your objection at length.

Mr. KNUFF. I first object to it on the ground that it is not covered by the examination-in-chief; second, that it is an attempt to introduce defense by the way of cross-examination; and, third, that it is immaterial and irrelevant.

Justice STEPHENS. The Court understood that all of those objections except possibly irrelevance and immateriality were the subject of your continuing objection. The objection is overruled.

Mr. BROMLEY. Will you read the question, please?

(The question was read by the reporter.)

The WITNESS. The prime reason was because the method covered by the license, of injecting soap air bubbles into the board, was decidedly cheaper in cost, and the resulting product could be made of much lighter weight, which meant savings in cost not only to us, but to all users of the board, on account of transportation.

By Mr. BROMLEY.

Q. That is to say, it made the freight charges paid by the purchasers less?

A. Yes.

Q. Now this soap air bubble introduced into the gypsum mix took the place of what you had theretofore used  
2383 to bring about a similar condition, that is, sawdust; isn't that right?

A. Correct.

Q. And as of this time, had any problems arisen with respect to the availability or quality of the sawdust?

A. I can't answer that question, I don't remember.

Q. Did you investigate or cause to be investigated carefully the subject matter of the foam invention, under which you were considering taking out a license?

A. I just don't understand that question. Do you mean did we investigate the legality of the patent, or—

Q. (Interposing) No, the merits of the invention disclosed by the patent.

A. Oh, yes.



Q. And did you make a careful investigation of the merits of the invention before you signed the license?

A. Yes, sir.

Mr. BROMLEY. Will the Government produce Mr. Whittemore's memorandum of May 27, 1929, to Mr. Van Hagan?

Mr. KNUFF. What is your item number, Mr. Bromley?

Mr. BROMLEY. X-281.

(Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May the Whittemore memorandum dated May 27, 1929, to Mr. Van Hagan, be marked for identification—

Justice GARRETT (interposing). By the way, that 2384 Exhibit 8 was only marked for Identification, I take it?

Mr. BROMLEY. Yes, Your Honor.

This May 27 memorandum will be marked Defendants' Exhibit No. 9 for Identification.

Justice JACKSON. This is Exhibit 9 for Identification?

Mr. BROMLEY. Yes.

(The document referred to was marked as Defendants' Exhibit No. 9 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, if you can, sir?

A. Oh, yes, I can identify it by my writing on it.

Q. Whose is it?

A. It is mine.

Q. And did you prepare it and send it to Mr. Van Hagan on about the time of its date?

A. Yes, sir.

Q. Referring to the first paragraph of that memorandum, let me ask you whether or not it does not refresh your recollection that the subject of a new bubble board, and a possible license therefor, was not brought up until after the execution of your May 22, 1929, license?

A. Frankly, I can't state positively. I don't think it was, but I couldn't swear to that.

2385 Q. You mean you think it was not brought up until after you executed your May 22, 1929, license?

A. That is right.

Q. And with this memorandum in mind, let me ask you again, was there ever any understanding between your company or your representatives and USG or anyone else, that as a condition for executing the May, 1929, license, USG would later find some patent on which to continue price control?

A. There was no such understanding, and I think this memorandum speaks for itself. It certainly indicates that on its face.

Mr. BROMLEY May I have the memorandum, Mr. Knuff, of June 5, 1929?

Mr. KNUFF. From whom, to whom, sir?

Mr. BROMLEY. From Mr. Whittemore to Mr. Van Hagan. (Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May this memorandum of June 5, 1929, from Mr. Whittemore to Mr. Van Hagan, be marked for Identification as Defendants' Exhibit 10, please?

(The document referred to was marked as Defendants' Exhibit No. 10 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, please, Mr. Whittemore?

2386 A. Yes, sir, that is my memorandum, as shown by my handwriting on it.

Q. And you dictated it and sent it to Mr. Van Hagan on or about June 5, 1929, did you?

A. Yes, sir.

Q. Now referring to the first paragraph of that memorandum, Defendants' Exhibit 10 for Identification, will you please explain the reference to "Thermocrete"?

A. Thermocrete was a trade name for a chemical bubble that we used in an insulating plaster. The chemical was added to the dry plaster, and when water was added it effervesced and caused bubbles to form. That patent was owned by us, and before we took out a license to use the soap air bubble process, we wanted to be sure that our own Thermocrete process was not adaptable to the manufacture of board.

Q. And did you experiment with it and see whether or not it was adaptable to the manufacture of a light weight board?

A. We did, and found out that it wasn't adaptable.

Q. And why wasn't it adaptable?

A. Because, unfortunately, the time element entered in, and if your material was used before the effervescence had ceased, you had your product all over the place. If it was used after the effervescence had ceased, and a  
2387 long enough time, you didn't have enough product to fill the space that should be filled.

Q. Doesn't this memorandum refresh your recollection that as of this time, your company was working on the problem of finding something to replace sawdust?

A. Yes. The tendency in the manufacture of board was to decrease the weight and at the same time maintain all of the strength and other characteristics of the board. When you used sawdust in your board, it was a difficult problem. When the bubble process was suggested, the problem became comparatively simple to reduce the weight of your board.

Q. Now looking at the last paragraph of Defendants' Exhibit 10 for Identification, is it the fact that you took up the question very thoroughly before you signed the November, 1929, license, as to whether or not the foam invention of USG was a good or a bad thing, and as to whether or not you couldn't accomplish the same result with Thermocrete or in some other way?

A. We took up that question very thoroughly, and my recollection is that Mr. Van Hagan saw the process in operation at least one of the USG plants before we signed any license agreement.

Mr. BROMLEY. Will you produce, please, Mr. Knuff, the Van Hagan-Whittemore memorandum of June 6, 1929?

2388 (Document handed to Mr. Bromley by Mr. Knuff).

Mr. BROMLEY. May this be marked as Defendants' Exhibit 11 for Identification, please?

(The document referred to was marked as Defendants' Exhibit No. 11 for Identification.)

By Mr. BROMLEY.

Q. Will you read it, please, Mr. Whittemore?

A. Yes, sir.

Q. Can you identify that memorandum, Mr. Whittemore?

A. Yes, sir, by my handwriting.

Q. And is it Mr. Van Hagan's memorandum to you of that date, which you received and read at about that time?

A. Yes, sir.

Mr. BROMLEY. Our photostatic copies do not show the handwriting very well.

Justice STEPHENS. It does not appear on ours. Read it, will you?

The WITNESS. Your Honor, the handwriting is: "Mr. Brown"; "D.F.B."—both of which are scratched; and "A.W.", which is not scratched. That meant to return it to me.

By Mr. BROMLEY.

Q. And does this memorandum further refresh your recollection, Mr. Whittemore, so that you can tell us if it be the fact that your research department was put to work in connection with the problem of finding a substitute for sawdust?

A. Yes, Mr. Van Hagan's memorandum so states—"in connection with possible use of Thermocrete to replace sawdust."

Q. And thereafter, did the research department report that it was not a practical substitute?

A. Yes, sir, they did.

Mr. BROMLEY. May we have, Mr. Knuff, the Van Hagan-Whittemore memorandum of June 22, 1929?

Mr. KNUFF. Is that X-271?

Mr. BROMLEY. Yes.

(Document handed to Mr. Bromley by Mr. Knuff.)

Mr. BROMLEY. And may it be marked Defendants' Exhibit 12 for Identification?

(The document referred to was marked as Defendants' Exhibit No. 12 for Identification.)

By Mr. BROMLEY.

Q. Will you identify that memorandum, please?

A. Yes, sir. It has my handwriting on it, "Mr. Brown", "AW", "COB", "SCS"—all scratched; and below, "AW" written by, I think, Mr. Nelson, to return the letter to me.

Q. So that it is Mr. Van Hagan's report to you of a Chicago visit, which you received?

2390 A. Yes, sir.

Q. On page 2, the first sentence in the first whole paragraph—

A. (Interposing) Yes, sir.

Q. What is the reference in that sentence, "I believe I have advised you in the past that we have hopes of sometime getting a correct application of Thermocrete. . . ."?

A. Well, that was trying to make it work, which they were never able to do.

Q. Referring to the last paragraph on the second page of Exhibit 12 for Identification, can you recall that within a couple of weeks your company, through your President and yourself, concluded, on the basis of these reports, to negotiate for and secure, if possible, a license from USG?

A. Well again, Mr. Bromley, I can't identify the time.

Mr. BROMLEY. Please show the witness Exhibit 228? Justice GARRETT. Government's Exhibit 228?



Mr. BROMLEY. Yes, sir.

(Government's Exhibit 228 handed to the witness.)

By Mr. BROMLEY.

Q. Do you see that that Exhibit 228, starting near the bottom of the page, under the heading "Bubble Patent", and continuing for the rest of the memorandum, has a discussion of the proposed bubble license agreement?

A. Yes, sir.

2391 Q. Now isn't the note at the top of that page, signed "George M. Brown", or with his initials, sufficient to refresh your recollection?

A. Yes, sir.

Q. And is it the fact, then, that on or about July 3, 1929, Mr. Brown finally decided and definitely decided to negotiate for and take a bubble board license if he could get one?

A. Yes, sir.

Q. And you concurred in that decision, did you not, as of that time?

A. My "O.K." is on the letter.

Q. You refer to what is written in ink at the left of the first paragraph, do you, on the first page?

A. Yes, sir.

Q. Now is there anything which occurred as of this time, Mr. Whittemore, which makes stand out in your mind particularly the degree of consideration which you gave to the proposed bubble and starch, or November 1929, license?

A. Yes, there is.

Q. What is it, sir?

A. We were considering some major changes in what is called the mixing belt. That is the point where the plaster is mixed with water and before it is made into wallboard. Those changes required building  
2392 changes, and ran into a fairly substantial sum of money because of the number of plants involved. Mr. Van Hagan and I discussed the matter, and decided that irrespective of whether we decided to use the soap air bubble or not, that it would be advisable to make those changes, and we did make them.

Q. Did you learn, during your negotiations for the November 1929 foam license, that USG had purchased from Universal the Haggerty and Hite starch patents?

A. I think we did, but I can't say when I learned that.

Q. Well, did there come a time when USG offered to include in its proposed license of the foam process, a license under the so-called starch patents?

A. I think so.

Q. Now did you investigate the subject of starch in connection with your final decision to accept the proffered USG license?

A. We had already investigated and talked about the starch situation.

Q. Well, what was it that you had found out as a result of your investigation with respect to the starch situation?

A. Well, we thought that we might be subject to infringement because of our use of starch. So when opportunity to relieve ourselves of any past infringement was presented, we were very glad to take advantage of it.

Q. And isn't it a fact that you found out as a result of that investigation that you had been using starch for a number of years?

A. We didn't have to find out, we knew it.

Q. Well, isn't it a fact that you also knew that you had been using starch for the purpose of securing a bond between the core and the paper?

A. That, we hoped, would be our "out" in case of infringement, but we weren't sure.

Q. Is it a fact that you concluded that you might be liable for a very large sum of money in case you were held to have infringed the Haggerty starch patent?

A. That was most certainly a possibility.

Q. Did you also conclude, or know as a fact, that a satisfactory gypsum board could not be made unless starch were used?

A. That is a pretty broad question, Mr. Bromley, and it leaves no degree. In other words, you say "satisfactory". That is an impossible question to answer.

Q. Would it be more accurate to say that you knew that starch was very important in the manufacture of a marketable gypsum board?

A. Much better, yes, sir, it was important.

Q. Did you know of any other way in which a marketable gypsum board could be made, that is, without using starch?

A. Well, there again, you get into the question of what is marketable and what isn't. I can't answer that question.

Q. Well, isn't it a fact that you knew that if you didn't use starch, your product would run with a very large number of peelers.

A. That is the reason we used starch, to prevent peelers.

Q. What does the industry mean by the use of the term "peeler"?

A. It means that you can just take the paper of a piece of board and if it sticks tight you will split the paper when you tear it off. If you have got a peeler, the paper will come entirely loose and clean from the plaster core.

Q. And you can tell immediately upon production whether your board is a peeler or not, cant you?

A. Well, sometimes it required pretty careful inspection.

Q. Well, I will put it this way: If it were a peeler, it would be fatally defective, wouldn't it?

A. Absolutely.

Q. It wouldn't be any good to anybody?

A. No, sir.

Q. It would be pure wastage?

2395 A. Yes, sir.

Q. Now wasn't the function of starch to prevent the manufacture of peelers and to secure firm adhesion between the paper and the core?

A. Yes, sir, that was the purpose of our use of it.

Q. When the proposed foam starch license was brought to your attention, isn't it the fact that USG asked your company to investigate the situation and make up its own mind as to whether it wanted the license or not?

A. Well, I can't answer that question, because I don't remember. But irrespective of what they had said, we would have done that.

Q. Mr. C. O. Brown testified, as I recollect, that Certain-teed might not have taken this bubble starch license if a substantial number of other companies had not done so. Now isn't it a fact that as in the case of the May license, Mr. Whittemore, Certain-teed took the November license without regard to what others were or were not doing?

Mr. KNUFF. May the record indicate our continuing objection, if Your Honor please?

Justice STEPHENS. Yes.

C. O. Brown was Mr. Claude Brown, was he not?

Mr. BROMLEY. Yes, he was Assistant to the President, and then the Vice President of Certain-teed.

Justice STEPHENS. Yes, I remember that.

2396 What is your view with respect to the propriety of this question?

Mr. BROMLEY. Well, I thought it was proper to ask his superior whether or not—

Justice STEPHENS (interposing). I mean as cross-examination. What is its relationship to the direct-examination?

Mr. BROMLEY. It has to do with the reasons for the company taking the November license, and is a defense against the charge that at the May, 1929, meeting, a conspiracy was hatched to take a license—

Justice STEPHENS (interposing). If it is directed to that purpose, the Court thinks it is proper.

Objection overruled.

The WITNESS. Will you repeat that question?

(The question was read by the reporter.)

The WITNESS. That is correct.

By Mr. BROMLEY.

Q. Was there any understanding between your company and USG or anybody else that you or they would consider, for the purpose of price fixing, that the use of starch fell under the Haggerty patent?

A. I don't get that. You mean our use of starch?

Q. Yes.

A. I frankly don't understand it.

2397

Q. I will withdraw it.

Was there any understanding among anybody in the industry, to which your company was a party, that the Haggerty starch patents would be used merely as a vehicle to obtain price control?

A. No.

Q. Was there any understanding entered into in November, 1929, or any other time, that the prices on gypsum board would be raised or stabilized after the licenses were entered into?

A. No, sir.

Q. Was there any promise or undertaking or statement by USG to the effect that it would establish a higher price for board than had theretofore existed?

A. I think I have previously testified that USG only told us after they had done something, and not before.

Q. And was there any understanding or agreement which had anything to do whatever with what the prices of plaster or unpatented gypsum products would be?

A. There never was any such agreement; or attempt.

Q. And was there any understanding or agreement that methods of production or manufacture would be standardized and made similar?



A. I can't answer that question. I don't know. There might have been minimum quality specifications, I  
2398 don't remember. There were certainly no maximum quality specifications.

Q. Well, was there any understanding arrived at, outside of the license agreements, that you would all do the same thing with respect to how you made board or the kind of board you made?

A. No, no.

Q. Now coming to the subject of perforated lath, Mr. Whittemore, will you tell the Court what the reasons were which impelled the Certain-teed management to take a license from USG under the Roos perforated lath patent?

A. USG had proposed to make a perforated lath which would be used for what is termed a one-hour fire test. Ordinary gypsum lath, without perforations and the consequent mechanical key, would not stand the one-hour fire test. In most metropolitan cities, and some of the smaller cities, fire laws require certain areas in residential construction to be protected by materials that will stand a one-hour fire test, such as stairs and various places of that sort.

We felt that in order to protect our mixed-car business, we would undoubtedly have to supply perforated lath. We also felt that if we tried to find some other way of making a perforated lath, that we would have to have it tested by the Bureau of Standards to see whether it would stand the  
2399 one-hour fire test or not. We felt that the volume of business would be small. And, not wanting to spend any money, we felt that the simple and easy thing to do, without undue expenditure, was to take a license.

We also realized that the statement that no patent is so strong that it can't be broken, and so weak that it can't be sustained, was pretty nearly true. We also realized that in litigated matters the attorneys are always 50 percent wrong—

Q. (Interposing) Sir? (Laughter)

Justice STEPHENS. That is quite all right, we are laughing in good part.

Q. The WITNESS. Well, it is a fact, isn't it?

Justice STEPHENS. You remind me of a remark of one of my former colleagues, Mr. Vinson, the present Director of the Economic Stabilization Office. Someone asked him what sort of opinions he wrote, and how they were being received; and he said fifty percent of the bar thought they were wonderful. (Laughter).

Proceed, Mr. Whittemore.

The WITNESS. In view of all those things, and the fact that we were losing money and we didn't want to build up any expense account and any possible liability on future litigation, we decided that the best thing to do was to take a license, which we did.

Mr. BROMLEY. Now you have said——

2400 Justice STEPHENS (interposing). Are you an engineer?

The WITNESS. Yes, sir.

Justice STEPHENS. How far do you think engineers agree as compared with lawyers?

The WITNESS. Not quite as well as lawyers, I think.

Justice JACKSON. They lack the class solidarity, as it is sometimes called, I guess. (Laughter.)

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. You made some reference to the fact that it was anticipated that the volume of business would be small. How did that matter turn out?

A. We made a bum guess.

Q. And what was the fact as to how the business went?

A. Business increased very rapidly.

Q. And it became a very, very valuable product, did it not, from a business-getting standpoint?

A. I think it is worthless, myself, but other people don't agree. That is your engineers, Your Honor. (Laughter.)

Q. As a matter of fact, the demand in the trade increased by leaps and bounds until the volume became very considerable indeed, isn't that right?

A. Yes, sir.

Q. In some of these memoranda which have been received in evidence, there is some reference to the  
2401 view of certain persons that the Roos patent owned by USG was flimsy or questionable. Now what impression did that kind of talk make on you in connection with your decision to take a license under the patent?

The WITNESS. Well, Your Honors, might I tell an experience?

Justice STEPHENS. You may.

The WITNESS. Many years ago, in one of our other lines of manufacture, the asphalt roofing business, we commenced blowing asphalt with air to oxidize it, and to replace a natural asphalt that was mined in Utah that we had been using, and after we had been using this process for several years, a patentor came along and said that we

were infringing his patent. So we investigated and decided that maybe he did have something, although we didn't think it was much, and we paid him \$25,000.

A few weeks later another patentor came along with another patent, and we paid him \$1,000, both of them for immunity from all past infringement, and an unlimited license in any plants that we then owned or thereafter acquired to blow asphalt in any quantity that we required.

The Barber Asphalt Company had the same approach from the same patentors, and undoubtedly had very good advice from their attorneys,—at least, they had very good attorneys,—but their advice was apparently dif-

2402 ferent than ours, because they decided to fight these patents, and they did fight them for 7 years. Representatives from the Barber Company used to call on me at least twice a year to get information on this matter, and they ended up with a judgment against them, after an accounting, of \$750,000. We were about four times as big as the Barber Company, so on a corresponding basis we would have had to pay about \$3,000,000.

They undoubtedly paid at least a half million dollars for attorney's fees and costs.

That was a lesson to us to be a little careful in building up possible patent infringements.

By Mr. BROMLEY.

Q. Now, sir, you said that one of your reasons was to protect your mixed-car business. Will you clarify that, please?

A. Yes, sir:

Most gypsum products are sold to building material dealers in mixed cars, that is, various kinds of board and lath, various kinds of plaster, blocks, joint filler, and any other items that are manufactured. If you are not able to supply all of the items that a dealer wants, you are apt to lose that business, because he would buy from the manufacturer who could supply him.

Q. That is, unless you could have a full line and satisfy all demands, you couldn't supply a mixed-car demand?

2403 A. Correct. I think I said, Mr. Bromley, unless we could supply what he wanted, that we would be apt to lose the business.

Q. Now you said a minute ago that you thought perforated lath was useless. Will you clarify that statement, please?

A. It takes 5 percent more plaster, and the bond of plaster to paper lath is so much better than any mechanical key that you can have, that there is nothing to it. In other words, you get a little more holding of your plaster, but it is infinitesimal for many practical reasons.

Q. The plaster that will stick to any ordinary, plain lath, will adhere to the face of paper lath very strongly?

A. About ten times as strong as it will to wood lath.

Q. Was it, in the early days, very difficult to get the public and plasterers to accept that as a fact?

A. Most difficult.

Q. And was it a real problem, in the early days of this industry, to educate the trade that as a matter of fact plaster would adhere very firmly to this paper-faced product?

A. It was most difficult, and salesmen were equipped with samples of plaster board with plaster applied to it, and a handle on it so they could try and pull it off from the plaster board, and then the plasterers wouldn't believe it.

2404 Q. Now isn't it a fact that in spite of your personal view of the value of perforated lath, that it is absolutely necessary wherever the local laws require the use of a material which has a recognized one-hour fire test rating?

A. Yes, it is necessary there, because ordinary lath won't stand the one-hour fire test. Plaster will drop off with a certain amount of heat.

Q. And isn't it the fact that the function which the mechanical key provides, by letting the plaster go through the holes and then drop in the back a little and forming a key, isn't that the thing that enables a wall constructed with that lath to withstand the one-hour fire test?

A. Yes, the bond is destroyed between the paper and the applied plaster, but the key will hold the plaster in place.

Q. And the bond is destroyed between the paper and the plaster by reason of the fact that the fire, heating the plaster to such a high degree, calcines it and it loses all its strength; isn't that right?

A. Correct. Adhesion is caused by fine fingers of water with plaster dissolved in it penetrating the paper and crystallizing, really, as fingers in the voids of the paper. They are very fine, and as soon as you apply heat to it, you are going to destroy that bond.



2405 Q. But these round plugs of plaster which go through the holes will withstand that calcining effect of fire for a much longer period than the tiny crystals?

A. Yes, it is purely mechanical, they hook over the back of the board like a finger.

2406 Q. Now it is necessary in the gypsum industry, as a marketing proposition, to have gypsum lath of the one-hour fire rating in order to meet the competition of such fire retarding plaster bases as metal lath, isn't it?

A. Yes, sir.

Q. And when I say "metal lath", do you understand I don't mean metallized lath?

A. I understand.

Q. Metal lath is lath made out of steel, isn't it?

A. Yes, sir.

Q. And of course such lath to which plaster is applied will meet the one-hour fire test?

A. Correct.

Q. So that your characterization of perforated lath as "useless", Mr. Whittemore, doesn't tell the whole story, does it, as to its value in the industry?

A. No, what I meant was that in probably 95 per cent of the places that it is used, they could just as well use the plain lath and save themselves money.

Q. Well, your criticism is of the requirements in the municipal laws and ordinances, isn't it?

A. That is really where it should be used.

Q. No, I say your criticism, when you said it was useless, is a criticism directed at the requirements of the municipal authorities?

2407 A. No, I don't mean that at all. I mean that to my mind there are many people that are using perforated lath where it isn't required, and where they would save money by using the straight lath.

Q. I see.

A. That is where I mean it is useless. In other words, any waste is useless.

Justice STEPHENS. I don't quite understand that yet, Mr. Whittemore. Will the straight lath withstand the fire test?

The WITNESS. No, but the fire test is only required, as a rule, where you have multiple dwellings and stairways that should be fireproofed.

Now then, many people in an ordinary frame house will use perforated lath and it is absolutely unnecessary.

By Mr. BROMLEY.

Q. And where people use perforated lath in ordinary houses, that is in situations where the law does not require it?

A. That is right.

Q. But the reason they do it is because they think that plaster will stick to that kind of lath better because of the mechanical key which the holes give it?

A. That is right.

Q. And with that assumption you disagree?

A. One hundred per cent.

2408 Q. But you do not mean to cast any aspersions upon the ability of perforated lath to live up to the requirements of the one-hour fire test?

A. Oh, no.

Q. It will do that, won't it?

A. Certainly.

Q. And that, ordinary plain lath will not do, will it?

A. No, sir.

Q. Is it the fact that at all times since your November license, sir, Certain-teed has consistently used both the foam invention and starch in its production of gypsum board?

A. Up to the time——

Q. (Interposing) When you left.

A. When I left.

Q. And that was when?

A. November 30, 1939.

Mr. STEFFEN. That, I take it, was not intended to be a technical question, "foam invention".

The WITNESS. Using soap bubbles.

Mr. BROMLEY. That is right, and starch.

The WITNESS. And starch.

We used starch before we had a license.

Justice GARRETT. Did you use starch before the Haggerty patent?

The WITNESS. Yes, sir, we did. You mean before we had a license, don't you?

2409 Justice GARRETT. I mean before the time the Haggerty patent issued.

The WITNESS. I can't say as to that, I don't know when it issued. But we used starch before we had a license under those patents.

By Mr. BROMLEY.

Q. Isn't it a fact that your use of starch, Mr. Whitte-

more, in connection with Judge Garrett's question, commenced only in 1926?

A. Well, we didn't make plasterboard before 1926.

Q. That is what I am coming to. So you couldn't possibly have used starch in the manufacture of board prior to 1926?

A. No, not in something we didn't make.

Q. And the Haggerty patent, Judge Garrett, is dated 1924, applied for in 1922, and issued in 1924. That is in evidence in this case and in the recitals in the licensing agreements, I take it, and alleged in the complaint and admitted—my friend tells me.

May the witness be shown Exhibit 316, please?

(Thereupon, Government's Exhibit No. 316 was handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at the third paragraph, sir, and particularly the reference to the "definite verbal commitment on the part of Mr. Henning that licensor would undertake to maintain a 25¢ per M differential for perforated over plain".

A. Yes, sir.

Q. Was this question, that is the question of whether or not Henning had ever made such a commitment, considered by your company?

A. Yes, because in some way somebody got the idea that some commitment had been made to maintain a price. We tried to find out whoever heard that commitment, and we couldn't find anybody that had ever heard of such a commitment, and I personally am sure such a commitment never was made. Mr. Henning didn't make those commitments.

Justice STEPHENS. How much longer do you think this examination will take? I am not trying to hurry you, Mr. Bromley, but I just inquire for the purpose of figuring upon another engagement.

Mr. BROMLEY. I am nearly through. I have five documents I would like to identify, with one or two questions, and then I am all through, sir.

Justice STEPHENS. Very well.

Mr. BROMLEY. Will you produce, Mr. Knuff, please, Mr. Van Hagen's memorandum to Mr. C. O. Brown of May 25, 1936?

Mr. KNUFF. May 25, 1936?

Mr. BROMLEY. Yes, sir.

Mr. KNUFF. I don't have it in Court, Mr. Bromley.  
2411 I don't know whether I have it over in the office or not.

Mr. BROMLEY. Can you tell from this photostat, that that is a photostat of Item X-91, Mr. Knuff?

Mr. KNUFF. I can tell that it is a photostat of Item No. X-91.

Mr. BROMLEY. That indicates that that is something you have in your files somewhere, doesn't it?

Mr. KNUFF. I wouldn't say that we have that in our files, because I haven't any recollection of it.

Mr. ADAMS. Well, it was subpoenaed.

Mr. KNUFF. That is some indication that somebody marked that X-91.

Mr. BROMLEY. You don't have any of these memoranda here now?

Mr. KNUFF. I haven't this one, Mr. Bromley, this is the one you have asked me about.

Mr. BROMLEY. Looking at the photostat, do you have any objection to our using the photostat?

Mr. KNUFF. Not at all.

Mr. BROMLEY. May this Van Hagen-C. O. Brown memorandum of May 25, 1936, be marked for identification as Defendants' Exhibit No. 13?

(The document referred to was marked as Defendants' Exhibit No. 13, for identification.)

2412 Mr. BROMLEY. May the memorandum from Warren Henley to Van Hagan of May 28, 1936, be marked for identification as Defendants' Exhibit 14?

(The document referred to was marked as Defendants' Exhibit No. 14, for identification.)

Mr. BROMLEY. And the letter of Warren Henley to Mr. C. F. Henning, of June 18, 1936—may that be marked for identification as Defendants' Exhibit 15?

(The document referred to was marked as Defendants' Exhibit No. 15, for identification.)

Mr. BROMLEY. And may Mr. Henning's reply to Mr. Henley of June 23, 1936, be marked as Defendants' Exhibit 16 for identification?

(The document referred to was marked as Defendants' Exhibit No. 16, for identification.)

Mr. BROMLEY. And may Mr. Henley's memorandum to Mr. C. O. Brown of June 24, 1936, be marked as Defendants' Exhibit 17 for identification?

(The document referred to was marked as Defendants' Exhibit No. 17, for identification.)



By Mr. BROMLEY.

2413 Q. Can you identify Exhibit 13 for identification?

A. Yes, sir, it has my initials on it. It says, 6/3/36—looks O.K. to me—A.W.

Q. And that is Mr. Van Hagan's memorandum sent to Mr. Brown, is it?

A. That is right, dated May 25, 1936.

Q. And can you identify Defendants' Exhibit 14 for identification?

A. Is there anything on the black photostat that might help me identify it?

Mr. BROMLEY. Do you have the original of that, Mr. Knuff?

Mr. KNUFF. Exhibit No. 14?

Mr. BROMLEY. Yes.

Mr. KNUFF. I haven't it in Court, I don't know whether it is in the office or not.

By Mr. BROMLEY.

Q. There is nothing on the photostat from which you can identify it, Mr. Whittemore?

A. No, there isn't anything by which I could identify it. Tell me this, this file seems to have A-4 on it. That might be a document file of Certain-teed's, I don't know.

Justice STEPHENS. Do you know anything about that, Mr. Adams?

Mr. ADAMS. I am not sure enough to be able to tell the Court as to the facts.

2414 By Mr. BROMLEY.

Q. Well, does that memorandum, Defendants' Exhibit 14 for identification, refresh your recollection?

A. About what?

Q. That, as of May 28, 1936, it was the opinion of your management that USG had the right to determine price changes up or down as they wanted to?

A. In perforated lath?

Q. Yes.

A. Yes.

Q. Now what is your recollection as to whether or not as of this time the proposed arrangements between USG and Certain-teed as to the license under the perforated lath patent did or did not give the licensor the unrestricted right to change prices up or down at any time he wanted to?

A. It did give him that right.

Q. Now can you identify Defendants' Exhibit 15 for identification, sir?

Justice GARRETT. What about Defendants' Exhibit 14, is that sufficiently identified?

Mr. BROMLEY. I am afraid not.

Justice STEPHENS. He hasn't offered any of these yet.

The WITNESS. I cannot identify Exhibit No. 15. I will have to explain that. It might seem funny not to be able to identify Warren Henley's signature, but most 2415 of his communications were inter-office, and were not signed, so I saw his signature very rarely. I think it is his signature, but I could not positively identify it.

Justice STEPHENS. Is he living now?

The WITNESS. No, he is dead.

By Mr. BROMLEY.

Q. Does the second paragraph of Defendants' Exhibit 15 for identification also serve to refresh your recollection that there was a discussion at the very time the license was signed, as to whether or not the licensor couldn't change the prices any time he wanted to?

A. Well, I understood always that the licensor could make any change any time he wanted to in any of the three licenses.

Q. And specifically—

Mr. STEFFEN (interposing). I should like to object to this whole line. The license agreement speaks for itself, quite obviously. There is no question of this witness' recollection being refreshed on the point, where the agreement is clear.

Mr. BROMLEY. Then, Mr. Steffen, do you withdraw all charges in this case, which are specifically referred to in the third paragraph of Exhibit 316, or otherwise, that Mr. Henning made a definite verbal commitment on the part of USG that it would undertake to maintain a 25- 2516 cent per thousand differential for perforated over plain lath prices at all times subsequent to the taking of the license?

Mr. STEFFEN. I would say, in reply to the question, that we do not withdraw such charges, and it is quite a separate matter. The license agreement may recite that USG may fix prices either way. There may be also an understanding apart from that, that they were going to maintain a differential, and I think that is substantially the charge made. But this evidence concerning what the agreement says is immaterial, I mean the written agreement.

Mr. BROMLEY. You understand, Mr. Whittemore—

Justice STEPHENS (interposing). Just a moment. The Court thinks the cross-examination is proper as going to the reasons why the agreements were entered into. The Government charges that they were entered into for price-fixing purposes. The defendants have a right to try to explain that. Objection overruled.

By Mr. BROMLEY.

Q. You understand, Mr. Whittemore, that any questions so far with respect to this matter have not been confined to what the license agreement provided—you understand that?

A. Yes.

Q. And it is your testimony, isn't it, that there were no commitments, either within or without the terms of the license agreement, by USG, as to maintaining  
2417 any twenty-five cent differential in price of perforated over plain lath?

A. There was no commitment on the part of USG to maintain any differential, and incidentally we thought twenty-five cents was ridiculous.

Q. Ridiculous in what respect, sir?

A. Too low.

Q. It was your desire that a higher price be fixed for perforated lath, than was fixed by USG?

A. Exactly, we thought it should be a dollar.

Q. Was it ever made a dollar by USG?

A. No, sir.

Q. As a matter of fact, within a year or two they reduced the price so as to cut out the twenty-five cent differential in favor of perforated, didn't they?

A. Yes, sir, I don't know how long a period it was, but it was done.

Q. Now can you identify Defendants' Exhibit 16 for identification?

A. No, I can't identify that at all. Again, I have seen Mr. Henning's signature, and it looks like his signature, but I can't positively identify it.

Mr. STEFFEN. We would like to make the same objection to this as being utterly immaterial. It merely recites two sections from an agreement which is in evidence.

Justice STEPHENS. Well, it has not been offered in  
2418 evidence, it is only being identified.

Mr. STEFFEN. The agreement is in evidence, your Honor, the agreement from which this exhibit quotes.

Justice STEPHENS. Let the Court see what this says, again.

Whether it will be admissible, the Court has not ruled. The Court is only now permitting identification. The objection to identifying it is overruled. Proceed, Mr. Bromley.

By Mr. BROMLEY.

Q. Doesn't the second sentence of the second paragraph of Exhibit 16 for identification also refresh your recollection that it was the position of USG and Mr. Henning at all times that there was no obligation upon USG to fix any prices at any specified figure, differential or otherwise?

A. My memory doesn't have to be refreshed on that point, Mr. Bromley. I know that they made no commitment. I have so stated, I think several times.

Q. Can you identify Defendants' Exhibit 17 for identification, please?

A. I can identify the handwriting on the top of it as Mr. C. O. Brown's.

Q. Can you tell whether or not it came to your attention?

A. No, I cannot.

Mr. BROMLEY. It was produced from the files of 2419 Certain-teed, wasn't it, Mr. Adams?

Mr. ADAMS. It was.

Mr. BROMLEY. And it was subpoenaed by the Government, was it not, Mr. Knuff?

Mr. KNUFF. Well, we subpoenaed a lot of things from Certain-teed. I presume that in answer to the subpoena probably Certain-teed did furnish something like this to the Government.

Mr. ADAMS. It was furnished in response to the subpoena.

Mr. BROMLEY. Will you, Mr. Knuff, see if you cannot produce all five of these exhibits when we reconvene?

Mr. KNUFF. Yes, I would be glad to. That is Defendants' Exhibits 13 to 17, both inclusive, for identification?

Mr. BROMLEY. Yes.

Justice GARRETT. Defendants' Exhibit 13 has been identified and the other four have not been identified, as I understand it.

Mr. BROMLEY. I think that is right.

Justice GARRETT. We had better return these to you, I guess, Mr. Bromley.



(The Court's copies of Defendants' Exhibits for identification Nos. 14 to 17, inclusive, were returned to Mr. Bromley.)

Mr. BROMLEY. May the witness see Exhibit 227 of the Government, please?

2420 (Government's Exhibit No. 227 was handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at the second sentence of the first paragraph of your memorandum of June 11, 1929, Exhibit 227 of the Government's, and tell me whether the word "possibilities" in that sentence was intended by you to refer to price fixing possibilities or some other possibilities?

A. You are going a little too fast, Mr. Bromley, wait until I read it, will you? The second paragraph?

Q. The second sentence of the first paragraph.

A. Now is that my letter of June 11?

Q. This is your memorandum, as I understand it.

A. Yes, that is right. You mean, "From this memorandum you can easily see the possibilities of this bubble patent"?

Q. Yes.

A. There was only one thought there, and that was the possibilities of making as cheap a product and just as good a one.

Mr. BROMLEY. Will you show the witness Government's Exhibit 228, please?

(Government's Exhibit No. 228 was handed to the witness.)

Mr. BROMLEY. Never mind reading that, Mr. Whittemore, I find I have covered what I wanted to ask with respect to that.

2421 By Mr. BROMLEY.

Q. Could you tell the Court how much metallized board was purchased by your company from any other manufacturer in the business?

A. No, but I think you could wheel it out in a wheelbarrow, more or less.

Q. You mean by that, that it was a very, very small amount indeed?

A. Infinitesimal in proportion to the volume of business we did.

Mr. BROMLEY. That is all.

Justice STEPHENS. Cross-examination by other defendants' counsel?

Justice GARRETT. I wanted to be sure about these Defendants' exhibits. Mr. Bromley, Defendants' Exhibits 1, 2, 3 and 4 have been introduced, have they not?

Mr. BROMLEY. No, sir, none of the defendants' exhibits have been offered.

Justice GARRETT. All have been just marked for identification?

Mr. BROMLEY. Yes, your Honor.

Justice GARRETT. Thank you.

Justice STEPHENS. Is there any other cross-examination?

Is there any redirect examination?

Mr. STEFFEN. Well, there will be some. We would  
2422 like to have a few moments' recess.

Justice STEPHENS. How long is it likely to take?

Mr. STEFFEN. It will be very short.

Justice STEPHENS. You have no other witness, I understand.

Mr. STEFFEN. No.

Justice STEPHENS. I inquire, because I have an engagement at the Patent Interchange Committee at four forty-five.

We will take a five-minute recess at this time.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

2423 Justice STEPHENS. Proceed.

Mr. KNUFF. May it please the Court, while the witness is still on the stand, we move to strike all of the testimony given by this witness in connection with exhibits marked for identification as Defendants' Exhibits 13 through 17, inclusive, for the following reasons:

First, the cross-examination was not proper since it went beyond the scope of the examination in chief.

Second, the cross-examination is an attempt to introduce by way of cross-examination the defendants' defense in this case.

Third, the testimony produced in connection with these exhibits is incompetent, irrelevant and immaterial.

We have no further redirect examination.

Justice STEPHENS. The motion is denied. The Court thinks it has already stated its reasons why it regards this type of examination as proper cross-examination. The Court thinks it would be error to limit the cross-examination as the motion and objections have sought to do.

The Court calls attention to the fact, however, that there has been no cross-examination upon the five exhibits which

were referred to, but merely a marking of those for identification.

Isn't that correct, Mr. Bromley?

Mr. BROMLEY. Yes, sir.

2424 Mr. KNUFF. No, there hasn't been any cross-examination in connection with those exhibits, as we normally understand cross-examination. My objection, in connection with those exhibits, was—or rather my motion in connection with those exhibits was—to strike out all testimony in connection with the examination conducted, based on Defendants' Exhibits 13 to 17.

Justice STEPHENS. Well, there were some excerpts from them read for the purpose of refreshing recollection. The exhibits are not offered in evidence yet. The Court has not ruled upon their admissibility. It may be that they will be offered for the purpose of showing what the understanding of the defendants was of the agreements, but the Court won't rule on that yet.

The motion is denied. So as to protect your record, your objection may be shown in full and the motion is denied.

Mr. ADAMS. If we have finished the proceedings for the day, I would like to inquire if the Court is able to tell us now approximately when we will adjourn in January, at the end of January? I understand we are to resume on January 17.

Justice STEPHENS. If someone can furnish a calendar, I think we can tell you that quite definitely.

We will resume on the 17th of January at ten o'clock; and unless my colleagues have a different understanding—

and they will please correct me if they have—we  
2425 will adjourn on Friday, January 28, because of the calendar which commences on Tuesday, February 1, of the Court of Customs and Patent Appeals. We will therefore probably resume thereafter, on February 8. That may, however, be changed if the convenience of my colleagues requires it. But we will sit from January 17, as presently planned, until January 28.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. I would like to ask the witness one question just to satisfy my scientific curiosity.

Mr. Whittemore, is the difference between a mechanical bubble, which has been referred to in the testimony as produced in the soap process, and a chemical bubble, referred to in the Thermocrete process, the result of the fact that the effervescent which you used in the Thermocrete process was the result of a chemical reaction, whereas the bubbles

in the soap process are due to surface tension in the water, with soap mixed?

The WITNESS. Yes. In other words, I can explain that very easily by saying that in the Thermocrete—I don't remember the chemical used, but that is added to the dry plaster. In the soap bubble process, your bubbles are manufactured and then put into the plaster after the water has been added to the plaster, and it becomes what is termed slurry; and that is mechanically mixed in there.

Justice JACKSON. The bubble is in existence in 2426 the soap before it goes into the slurry, whereas in the other it doesn't come into existence until after it is in the dry powder?

The WITNESS. That is right.

Justice STEPHENS. Is there anything else?

This witness, I assume, may be excused upon the adjournment of Court?

Mr. STEFFEN. Yes.

Justice STEPHENS. The Court has one comment to make that perhaps will be helpful to counsel. There have been now seven or eight reserved rulings which have been reserved in deference to the Government's request that the Court reserve its rulings until the Government presents a memorandum in connection with its offer of proof. As we understand the offer of proof, it is merely an offer to prove, for the purpose of protecting the record by the Government in respect to the Court's exclusion of the answers to questions which sought to go into the subject of the purchasing of board by one defendant from others, or by the defendants from each other, and the fixing of prices upon purchased board as distinguished from board manufactured and sold.

The Court gave the Government the opportunity to protect its record in the usual course by making an offer of proof on that subject. The Court thinks that that offer could be ordinarily made orally, but if the Government wishes to make it in writing, it may be done that 2427 way. But it seems to the Court that it could be quite briefly done.

The Court has suspended ruling upon these other questions which went to such subjects as Metal A, as the Court remembers, and certain other allied topics, because the Government requested the right to present a memorandum.

The Court wishes in the future, if it can, to avoid this reservation of rulings because it is very difficult to keep them all in mind, and it is necessary now to accumulate



them carefully and make a careful inspection of each one when a final ruling is made.

The Court hopes that we will not be asked to reserve rulings in the future.

The Court also hopes that the memorandum which is intended to be presented can be brief, and can be presented at a very early date, so that defendants' counsel can have an opportunity to see it and respond with any memorandum in reply, which they desire to present, because, at least so far as the Presiding Judge is concerned, who is not occupied with the work of another court, I wish to spend nearly all of the recess in reading exhibits and reading the record, and not have to occupy myself unduly with a consideration of briefs and memoranda.

And in aid of a possible shortening of that memorandum, the Court will make a brief statement as to what it considers the problem involved, and perhaps that will  
2428 shorten the memorandum.

The question which seems to be concerning Government counsel is the right to prove items—I use that general term advisedly—which are not mentioned in the complaint, and the contention seems to be that under the new rules there is no restriction, or little restriction, in respect of such offers as had been made.

Now the Court of course recognizes that the new rules are liberal. It is true under the new rules that, for example, a cause of action in negligence can be stated, good against general demurrer, by stating that the defendant negligently struck the plaintiff and injured him with an automobile. But obviously that would inform the defendant in no manner at all as to how the alleged accident took place, whether by driving while intoxicated, or driving with loose brakes, or driving through a red light, or driving beyond the speed limit.

Therefore, the rules permit a demand for a bill of particulars. And it is the Court's understanding of the new rules that when a bill of particulars is furnished specifying the acts of negligence relied upon, the case then reaches a state of certainty under the pleadings such as existed under the old rules, and that the plaintiff would be bound by the acts of negligence enumerated in the bill of particulars, and could not prove others without amendment or further bill.

Now it seems to the Court that the confusion, if  
2429 it be confusion, or misunderstanding, between the Court in its rulings thus far, and the contentions of

the Government, lies in that situation. It seems to be the contention of the Government that in a conspiracy case the Government is not thus limited.

Now the Court has not intended to rule thus far that the Government was limited in its presentation of evidence by the enumerations in the complaint, because neither the complaint nor the bill of particulars is a statement of evidence.

The Court has not intended to rule, and thinks it has not ruled, that the Government cannot introduce evidence, cannot offer and introduce, if it is relevant and competent and material, evidence of conspiracy or price fixing or combination charged, merely because it is not mentioned in the complaint, or the bill of particulars.

The doubt the Court has had about the Government's offers thus far has been that the evidence offered has seemed to be evidence which related to charges not made in the complaint.

Now it is true that a conspiracy at common law and under the Sherman Act, as I remember it, does not require the allegation of overt acts. The conspiracy lies in the agreement. The overt acts are evidences of the agreement, of carrying it into effect.

What the Court has been ruling thus far has been that the Government is limited in its proof, whether it  
2430 is talking in terms of evidence or overt acts or what not, to the charges which may be fairly said to have been made in the complaint and the bill of particulars. It would seem to the Court that there could be very little doubt on that subject, and that the problem is more one of applying settled rules than it is of defining the rules.

The Court makes this brief statement for the purpose of clarification and hopes it will save the Government and defendants from any extensive discussion of the law, although we would be very glad to have the help of the Government and defendants on both sides.

Do you have anything, Mr. Johnston?

Mr. JOHNSTON. If the Court please, I would like to request that my copy of this written memorandum be furnished by the Government to me at Oklahoma City.

Justice STEPHENS. I assume that will be done.

The Court thanks counsel for their help in the case thus far, and wishes all counsel and witnesses a pleasant vacation and one free, we hope, from illness.

The Court thanks this witness for attending this Court.

Justice JACKSON. Not only a good vacation, but a good Merry Christmas if you can have one.

Justice STEPHENS. We will recess until the 17th of January, 1944, at ten o'clock.

(Thereupon, at 3:45 o'clock p.m., an adjournment was taken until Monday, January 17, 1944, at 10:00 o'clock a.m.)

2431 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

*Washington, D. C., Monday, January 17, 1944.*

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

2436 Mr. STEFFEN. Mr. Brown, please.

Thereupon,

GEORGE M. BROWN

appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

Mr. STEFFEN. Has the Court, may I inquire, a full set of photostats of the George M. Brown exhibits?

2437 Justice STEPHENS. Is this what you have reference to? (indicating).

Mr. STEFFEN. No, there are only three or four.

Justice STEPHENS. Probably we have, but I may have misplaced them.

Mr. STEFFEN. I have two sets, and I think either Mr. Finck or Mr. Johnston have the third. So that the Court does not at the moment have any.

Mr. JOHNSTON. If the Court please, don't go blaming it on Mr. Johnston to start with. I have never seen them.

Justice STEPHENS. The presiding Judge has one set.

Mr. STEFFEN. Here are two sets.

(Documents handed to the Court.)

Justice STEPHENS. Then there is a mistake. What I had here was a set of the C. O. Brown exhibits. We haven't a third set. I have none myself.

I am mistaken. I do have a set. The sets you handed to Judge Garrett and Judge Jackson are identical with mine except that the one on top of the set handed to me has an extra letter of January 25. Perhaps that is not necessary.

Proceed.

By Mr. STEFFEN.

Q. Will you state your full name, please?

A. George M. Brown.

Q. What is your residence, Mr. Brown?

2438 A. Watch Hill, Rhode Island.

Q. Were you at one time connected with the gypsum industry?

A. Yes, sir.

Q. Were you connected with the Certain-teed Products Corporation?

A. Yes, sir.

Q. For what length of time, Mr. Brown?

A. I started the business.

Q. In what year?

A. 1904.

Q. 1904?

A. Yes, sir.

Q. And when did you leave the business?

A. 1936.

Q. What office did you hold during the time you were with Certain-teed Products Corporation?

A. President of the company, or Chairman of the Board at the end.



Q. For how long were you Chairman of the Board?

A. Between one and two years, if I remember correctly.

Q. That would be during 1935 and 1936, or 1934 and 1935?

A. No, 1936 and part of 1937—no, 1935 and 1936.

Q. You were President of the company from 1904 up until 1935?

2439 A. Yes, sir.

Justice STEPHENS. Mr. Steffen, if this witness is a little hard of hearing, we may vary the ruling and you may stand nearer. It will be very tiring to raise your voice constantly. That is, if you wish to.

Mr. STEFFEN. Thank you.

By Mr. STEFFEN.

Q. What was the business of the Certain-teed Company when you first started it, Mr. Brown?

A. Well, it started from the beginning, it had no business.

Q. I mean the day after you started, what business were you in?

A. In the manufacture of ready roofings.

Q. What was that?

A. Well, roofings that were put up in rolls or shingle form, ready to use, asphalt and coal-tar products.

Q. And did you expand that business from time to time?

A. Yes, sir.

Q. What was your next addition to your line?

A. If you would be willing to look up those records, it would be better than my trying to remember it, I am afraid.

Q. This is just a preliminary question. I want to find out the scope of the business generally.

2440 A. Well, building and insulating papers of various kinds, dry felts.

Q. And what next?

A. Well, offhand, I would say paints and varnishes and linoleums, floor coverings; and perhaps at that time, or a little later, gypsum.

Q. What time did you take on the gypsum business, do you remember?

A. I don't think I can answer that.

Q. Well, I think it was along in 1926, was it not?

A. Probably.

Mr. ADAMS. The record shows it was 1923.

The WITNESS. Well, I couldn't answer that, then.

By Mr. STEFFEN.

Q. We will agree on 1923.

A. All right.

Q. What plants or companies did you take over when you got into the gypsum business?

A. I don't believe I can tell you their actual names.

Q. Well, did you have a plant at Acme, Texas?

A. We began in the Southwest in Texas and Kansas and that area.

Q. Where was your plant located there, Mr. Brown?

A. Well, my memory is none too good for names, and I can't tell you. I don't think I can answer those  
2441 things, but they are all matters of record.

Q. That is correct, but we want your recollection as nearly as possible. Did you have one at Acme, Texas?

A. Yes, Acme, Texas.

Q. And do you remember what sort of board you made there at Acme, Texas, an open-edge or closed-edge board?

A. In the beginning we made an open-edge board.

Q. Do you recall where you sold that open-edge board, what territory?

A. Wherever we could afford to sell it and could sell it. We shipped it over rather a wide area because that was our only supply for a time.

Q. And at a later time did you get other gypsum properties?

A. Yes.

Q. And what properties did you buy?

A. Later we acquired the Beaver properties.

Q. Do you recall about when?

A. I think that was in 1928. My recollection on these dates is not exact.

Q. That is right, your recollection is good. You acquired it, according to the testimony here, in the first of 1928.

A. Yes, I thought that was it.

Q. Now, do you know what type of board the  
2442 Beaver companies were making?

A. They were making what they called the closed-edge board at the time that we took over the properties.

Q. And did a question arise as to whether you, in operating the Beaver companies, would continue to make a closed-edge board?

A. Yes, sir.

Q. Was there a discussion among the officers of your company about that matter?

A. Oh, yes.

Q. And did you ever take that matter to the United States Gypsum Company to discuss?

A. Well, I think we discussed those things among ourselves, primarily. We did, in the course of time, have some talks with the United States Gypsum.

Q. What was the United States Gypsum Company's position concerning whether you should make a closed-edge board or an open-edge board, do you recall?

A. I think they offered—

Mr. ADAMS (interposing). Could I interpose a suggestion here that this be fixed with some kind of reasonable certainty as to when they took this position, and who took it; if it was a conversation or a writing, so that we could be prepared to cross-examine on it?

Mr. STEFFEN. We will be glad to do that, Your Honor.

2443 Justice STEPHENS. If you please, that should be done.

Mr. STEFFEN. May we have the question answered that has been asked? Will you please read it?

(The record was read by the reporter.)

The WITNESS. They offered us a license under their patents, if that is what you mean.

By Mr. STEFFEN.

Q. That is what I mean, yes.

A. Yes.

Q. And when you say "they offered us", you mean they offered the Certain-teed Products Corporation?

A. Yes.

Q. And they offered a license which would be applicable to your Acme plant, and also your Beaver properties, is that what you mean to say?

A. To our entire properties.

Q. That was their offer?

A. As well as I remember it.

Q. Now do you recall an occasion when you discussed that offer with Mr. Avery in Chicago?

A. Well, I remember meeting Mr. Avery. The first time I ever met him was along about that time. I hadn't met him until—I can't recall the date—but it was along about that period, and we did discuss that question and all, but got nowhere.

2444 Q. Got nowhere?

A. No.

Q. What was your position at the time?

A. Well, I guess it was against it.

Q. What were your reasons, Mr. Brown?

A. Well, we had always handled our own affairs as far as we were able, and didn't like the idea of taking a license and having our prices set for us, for one thing.

Q. Was that required, that you should have your prices fixed if you took a license?

A. Under a patent license, yes, that is always required, within my knowledge.

Q. And that was discussed with Mr. Avery at the meeting in Chicago?

A. I don't know whether it was discussed or not, but we knew that would occur. We knew enough about the situation to know that was part of it, would be a part of it.

Q. You had a copy of the license agreement which the United States Gypsum Company was offering you?

A. I don't know that we did.

Q. Well, the Beaver Products Company had a copy, did it not?

A. I presume they did, they never showed it to me.

Q. They were licensees. And you understood, as you say, that under the license the United States Gypsum Company would fix your prices?

2445 A. They would fix our prices on anything where a patent controlled the product.

Q. And you were opposed to that?

A. Yes, sir.

Q. Did you consider the possibility of continuing the Beaver license for the Beaver plants, and continuing an open-edge board at your Acme plant?

A. No, sir.

Q. What did you say?

A. No, sir.

Q. The question is—did you consider that as a possibility?

A. No, sir.

Q. Why not as a possibility?

A. Well, we didn't want two lines of board, and we thought if we continued with the Beaver properties it would obligate us in other ways, I presume.

Q. So, if I get your testimony, you either wanted to be free to make an open-edge board, without price fixing, at all of your plants, or to make a closed-edge board at all of your plants; is that correct?



A. Well, we weren't anxious at that time to go into the closed-edge board, because we would be amply provided for with an open-edge board.

2446 Q. Did you think you could make an open-edge board in competition with the closed-edge board?

A. We hoped we could.

Q. Was your company at Acme making a profit at this time, do you recall, on its open-edge board business?

A. Oh, yes, as far as I remember it. It was a plant that did make money. I don't know as to just that particular period.

Q. Do you recall, Mr. Brown, what companies were in the gypsum business during 1928 and 1929, who were your competitors?

A. Well, you call their names and I could tell you about them, I think, but I can't remember those names.

Q. All right. Do you remember the National Gypsum Company?

A. Yes.

Q. Were they a competitor of yours?

A. Yes.

Q. Do you remember the Ebsary Gypsum Company?

A. Yes.

Q. And were they a competitor of yours?

A. Yes.

Q. Do you remember the Niagara Gypsum Company?

A. Not very well. I think there was such a company.

Q. Operating in Buffalo or having its plant at Buffalo?

2447 A. Well, I never was at their place of business. I don't know who ran it, but I remember the name.

Q. Do you remember a Mr. Reeb?

A. Yes, I remember the name, Mr. Reeb.

Q. And did you know Mr. Fred Ebsary at the head of the Ebsary Gypsum Company?

A. Oh, yes, I knew Mr. Ebsary.

Q. And did you know Mr. Haggerty, who was at the head of National?

A. Yes.

Q. Did you know the American Gypsum Company at Port Clinton, Ohio?

A. Who was the head of that?

Q. Well, there were two men, Mr. Griswold and Mr.——

A. (Interposing) Oh, yes, I knew Mr. Griswold.

Q. (Continuing)—and Mr. Kling.

A. Yes, I knew Mr. Kling.

Q. And did you know the Universal Gypsum Company—and Mr. Holland was at the head of that, Eugene Holland?

A. Oh, yes, I knew Mr. Holland very well.

Q. And the Texas Cement Plaster Company?

A. Yes.

Q. Mr. Samuel Gloyd?

A. Yes, I knew Mr. Gloyd very well.

Q. And the Kelley Plasterboard Company, operating in New Jersey?

A. I don't think I knew them.

Q. Mr. Stephen Kelley?

A. I don't recall.

Q. Well now, do you recall whether the competition in the board business was sharp in 1928 and 1929, or whether it was just—

A. (Interposing) Well, it was sharp at some time. I can't remember just what that date was. The price records of the companies will show that very clearly, however.

Q. I think that is true, I think the records show that there was price competition during the early years up until 1929; is that your recollection?

A. I think it began as more modest competition, but went to a rather extreme competition. Just what the dates were, I can't recall.

Q. Now it has been testified here that the prices got down so low in 1929 that they couldn't go any lower; is that your understanding?

A. I don't think that was ever true.

Q. But that they got very low?

A. They got very low.

Q. I want to come back, Mr. Brown, to the early part of 1928, right after you had taken over the Beaver Products Company.

2449 A. Yes.

Q. You had bought the assets, as I understand it, of that company?

A. I think that is it.

Q. And didn't come into possession until April, 1928?

A. The records would show.

Q. That is what the records show, I believe.

A. Yes.

Q. Now I want to ask you some further questions concerning your meeting with Mr. Avery in Chicago.

A. The first meeting?

Q. Yes, at which the discussion had to do with whether you would take out a license under the closed-edge board patent for all the Certain-teed Products Company's plants; and I would like to have you recall as well as you can what took place at that meeting, and who went out there?

A. I went out there, and somebody was with me, but I have forgotten who it was.

Q. Well, was it Mr. Blagden—

A. (Interposing) And we didn't get anywhere.

Q. Was it Mr. Blagden?

A. I don't think Mr. Blagden ever traveled with me, but I think he was there. But we hadn't taken that company over at that time, had we?

Q. You had bought the properties, but you hadn't  
2450 gone into occupation or operation yet.

A. Along about that time, I know it was.

Q. Now it has been admitted here, I think, by the defendant United States Gypsum Company, that Mr. Blagden and yourself were out in Chicago on the 29th of February.

A. I think Mr. Blagden made the appointment for me to meet Mr. Avery on a visit to Chicago. That is my recollection.

Q. And do you recall whether there was anyone with Mr. Avery?

A. There was Mr. MacLeish, I think.

Q. So that the meeting was between the four of you, Mr. Blagden and yourself, Mr. MacLeish and Mr. Avery?

A. Let me qualify that, I am not positive that he was there, but I know that he was generally with Mr. Avery on occasions of that kind.

Q. That is right.

A. I have no recollection of his failing to be with him then.

Q. You testified that at your meeting you got no place with Mr. Avery at all?

A. No.

Q. And you came back to New York?

A. We didn't go out there with the expectation that we would, if you want to know the truth.

2451 Q. I would like to know the exact truth. What did you expect?

A. We were urged by the Beaver man—

Q. (Interposing) That is Mr. Blagden?

A. Yes. (Continuing)—to meet Mr. Avery. I never had met him, and up to that time he had probably heard some

bad stories about me, and I had about him, and we didn't get along very well. I don't think, if I could repeat all the conversations, that they would be at all interesting to you.

Q. I think they would be very interesting.

A. I doubt it.

Q. Won't you tell us a little more in detail what did take place?

A. Well, we disagreed on about everything.

Q. Name some of the things?

A. I don't believe I can.

Q. Well, may I refresh your recollection on the point?

A. If you can.

Q. Well, did you talk about the desirability of stabilizing the industry?

A. I don't think so.

Q. Did you talk about the matter of fixing prices under the agreement?

A. No, we didn't talk about things like that.

Q. Well, what did you talk about?

2452 A. We talked in more general terms about the open-edge board, I presume; that is my best recollection. Within my business experience, two business men meeting like that don't sit down and begin to talk prices, and things like that, which they both know very well isn't just the best way to do it.

Q. That is, you knew that the license agreement provided for price fixing?

A. Well, I knew that anything that was under the patent law did. I thought you meant talking about the price of gypsum.

Q. Oh, no, that was well understood, as I take it.

A. Oh, it was well understood by me, and I am sure it was by everybody there, that if we took a license there would be a price fixing under the license.

Q. Well, I am interested, Mr. Brown, in finding out just what two business men—you were at the head of a large company, and Mr. Avery was at the head of a large company—what did you talk about?

A. The desirability of making—I am assuming, now—

Q. (Interposing.) No, I would like to have your actual recollection.

A. I don't remember.

Q. I would like to have you remember, if you can.

A. I had better not try to tell you.

Q. Did you talk about the Utzman patent?

2453 A. Oh, no. That was for lawyers.



Q. I will show you, Mr. Brown—

A. (Interposing) I don't think two business men sitting down and talking talk about the things you think they talk about. (Laughter).

Q. How long were you talking, do you remember?

A. Well, as I remember it, I got in there and we met at, if I remember correctly, the Chicago Club, in the middle of the afternoon, talked for a time, and met the next morning, and I left on the noon train for New York, if I remember correctly. I think that is it.

Q. Well, that is quite a long talk. What did you talk about?

A. Well, how long ago was that?

Q. Fifteen years, sixteen years.

A. I have been out of business for some years; and I am not as young as I once was, and I can't recall those conversations.

Q. Well, let me show you, Mr. Brown, what purports to be a memorandum that you prepared when you got back to New York.

A. Now you are getting somewhere.

Q. And it has been taken from the files of the Certain-teed Company.

A. All right, that is much more reliable.

2454 Q. I would like to show you Government's Exhibit 212.

Mr. BROMLEY. That is 212 for identification?

Mr. STEFFEN. That is correct.

Justice GARRETT. Is that the letter of May 15?

Mr. STEFFEN. That is a memorandum which purports to be prepared by Mr. George M. Brown, President, under date of March 1, 1928, entitled, "Memorandum Regarding the Possibility of Making Plasterboard under the Royalty Basis."

Justice STEPHENS. It is not in this set that you have before you, Judge.

Justice GARRETT. I see.

By Mr. STEFFEN.

Q. Will you read that, Mr. Brown, please? It has already been marked for identification.

Now, Mr. Brown, does that memorandum, in the second paragraph there, express your views, as you now recall it?

Mr. ADAMS. I object to that, Your Honor. It seems to me that that is not a proper way to inquire as to what the witness' testimony is. Let's find out what he knows about

the fact that counsel wants to know about, and then see if this refreshes his recollection. We have been over this same practice before, of showing the witness a piece of paper that is not in evidence, and asking him if it expresses his views.

Justice STEPHENS. It is not in evidence, is it?

2455 Mr. STEFFEN. No, Your Honor. It has been simply marked for identification.

Justice STEPHENS. Are you using it to refresh his recollection, or are you going to offer it in evidence?

Mr. STEFFEN. I was going to certainly offer it in evidence, but I was first going to use it to refresh his recollection concerning certain questions that I would like to ask him.

Mr. BROMLEY. But it has never been identified by anybody.

Mr. STEFFEN. It need not be identified for purposes of refreshing recollection.

Justice STEPHENS. The objection is well taken. If you are going to use this at the present time merely for the purpose of refreshing recollection, you should ask the witness if it does refresh his recollection, and then ask him to state what his recollection is, if his answer is in the affirmative. That is the conventional way of proceeding.

By Mr. STEFFEN.

Q. Well, Mr. Brown, you have examined Government's Exhibit 212 for Identification—

A. (Interposing) Is that this paper (indicating)?

Q. Yes.

A. Yes.

2456 Q. Is it in the general form of memoranda prepared by your company, do you know?

A. It seems to be a typewritten sheet, and there were plenty of them around in our office, I guess, our office.

Q. I notice it says, "George M. Brown, President" in the upper right-hand corner. That is your name, and you were President at this time, were you not?

A. I always signed my mail. Why don't you get a signed one?

Q. This is not mail; this is simply an interoffice memorandum, is it not?

A. I don't know what it is.

Q. What would you say, from looking at it?

A. I wouldn't say.

Q. Did you have a stenographer whose initials were "D.S.", do you remember?

A. Were what?

Q. Notice that after your name there are the initials "D.S.". Do you know what those initials referred to?

A. I do not.

Q. Did you have a stenographer whose initials were "D.S.", or a secretary?

A. I can't even remember the names. I can't answer that.

Q. Well, you have testified that you talked with Mr. Avery and Mr. MacLeish for part of one afternoon and part of the next morning, concerning this matter. Did you by any chance mention the Ebsary Gypsum Company in that conversation, do you remember?

A. I haven't the least idea.

Q. Would this memorandum refresh your recollection on that point, the second paragraph?

A. Well, I wouldn't know.

Q. Will you read it, please, and see if it refreshes your recollection?

A. I have read it, and it does not.

Q. Do you recall whether you talked about the National Gypsum Company, as to whether they would maintain price fixing?

A. I am very sure that we didn't talk about whether the industry would maintain—

Q. (Interposing.) Maintain a fixed price?

A. I don't think we talked about those things.

Q. Why wouldn't you talk about them?

Mr. ADAMS. I object to that. That is not a proper question.

Justice STEPHENS. That really is in the form of argument or cross-examination. The objection is sustained.

By Mr. STEFFEN.

Q. Is there any reason why you wouldn't talk about it?

Mr. ADAMS. That is the same question, Your Honor.

2458 Justice STEPHENS. Sustained.

By Mr. STEFFEN.

Q. Are you real sure you didn't talk about price fixing.

A. I am quite sure we didn't, because that wasn't the principal interest in the matter.

Q. What was the principal interest in the matter?

A. To make a board that our trade was anxious to get hold of, that our sales department had found that our trade

wanted, and the sales department was even more anxious to get hold of it; our manufacturing department had reported that they could make it to advantage.

Q. Any other interest?

A. Well, that is a long time ago—

Q. (Interposing.) Would it result in stabilizing the industry on one form of board?

A. Well, I think it did that, but I don't remember that was the subject of the conversation.

Mr. BROMLEY. I move to strike out the answer as speculative, if the Court please.

Mr. STEFFEN. I think it is not a speculative answer; it is a positive answer, that it did that.

Justice STEPHENS. He said he thought it did that.

Mr. BROMLEY. A conclusion, perhaps. I should have said.

Mr. STEFFEN. No, he stated that as a fact, that  
2459 it did stabilize the industry.

Justice STEPHENS. Read the answer.

(The answer was read by the reporter.)

Justice STEPHENS. The motion is granted.

Mr. STEFFEN. The motion to strike is granted?

Justice STEPHENS. Yes. He said he thought. What the witness thinks happened in a situation is his conclusion.

The WITNESS. That is all I can say about it, I can't recall—

Justice STEPHENS (interposing). We don't expect you to recall any more than you can, Mr. Brown.

If the witness knows, the Court is not intending to rule that you can't ask the witness if he knows, as a member of the industry, what happened with respect to stabilization, which is the particular subject you were inquiring into at that time. But the motion is sustained for the reason that it was a mere expression of opinion.

You should understand, Mr. Brown, that while we like to have you answer the questions as directly and as fully as you can, we understand that neither you nor any of us can remember things in great detail that happened 15 years ago, and if you can't remember them you can frankly say so.

The WITNESS. I am sure you will understand, Your Honor, that when two men meet that way, and they disagree on about everything, you don't carry all that  
2460 conversation in your mind.

Justice STEPHENS. You are not under criticism for not remembering. We can't any of us remember all that we have been through, of course, 15 years ago.



By Mr. STEFFEN.

Q. Do you recall whether suit had been filed against you by the United States Gypsum Company at the time you were out in Chicago talking with Mr. Avery?

A. No, I do not.

Q. Will you read the last paragraph of your memorandum and see if that refreshes your recollection on that?

A. Well, I don't know what this is.

Mr. BROMLEY. I object to the question on the ground that it assumes facts not in evidence, and I refer specifically to the question and that part of it in which Mr. Steffen refers to the memorandum as "his" memorandum. He hasn't identified it, and nobody has identified it.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. The question does assume, Mr. Steffen, that it is his memorandum.

Mr. STEFFEN. I didn't intend to assume that, of course.

Justice STEPHENS. Thank you. Rephrase the question. The objection is sustained.

By Mr. STEFFEN.

2461 Q. What we want to know, Mr. Brown, is whether the United States Gypsum Company started a suit against the Beaver Products Company in the spring of 1928, if you remember that?

A. It did.

Q. And had they started that suit prior to the time you went out to see Mr. Avery?

A. I can't remember.

Q. As a matter of fact, wasn't that the purpose of your going out to see Mr. Avery?

A. About the suit?

Q. Yes, sir.

A. No, I don't think so.

Q. Will you read the last paragraph of the memorandum before you, and see if that refreshes your recollection concerning one of the subjects which you may have talked to Mr. Avery about at this time?

A. What do you think should refresh my memory? I don't get it.

Q. To answer your question, I would say that you say in your first sentence, "We must prepare to answer the suit of the United States Gypsum Company."

Mr. ADAMS. I object to that,—I didn't want to interrupt the question. He didn't say any such thing in his first sentence. He said he doesn't know who wrote this memorandum, and he has no recollection. Counsel is saying again and again that it is his memorandum, and the witness says it is not.

Mr. STEFFEN. I didn't say that.

Justice STEPHENS. The record may show that the Court is not treating it, as previously referred to, as the memorandum of the witness, and Mr. Steffen has stated he doesn't intend to have it so regarded.

Mr. ADAMS. And I also object to counsel reading into the record what is contained in the memorandum.

Justice STEPHENS. The Court has already ruled that that should not be done in any substantial manner, but I think this is de minimis, Mr. Adams. Mr. Steffen was only asking the witness, in effect, to look at the first sentence of the second paragraph.

Let me explain to you, Mr. Brown, if you will just lay that down a moment. Perhaps you are not entirely familiar with what we are trying to do here. Sometimes if a witness, because events are a long while ago, doesn't remember them, we try to bring something to the attention of the witness which may possibly refresh his recollection.

The WITNESS. Yes, I understand.

Justice STEPHENS. Sometimes if we look at an old exhibit or an old memorandum or an old journal of some sort, whether or not we prepared it ourselves, it might possibly jog our memory, as we say. That is what is being done here. You are being asked to read this. Take your time to read it, if you haven't done so already, especially now the last paragraph on the second page, and see whether or not the items on that paper do happen to jog your memory about past events. If they do not, you may say so; and if they do, tell us what you remember.

The WITNESS. This refers to—

Justice STEPHENS (interposing). Never mind that. Just read it to yourself, and after you have finished reading it carefully to yourself, just lay it aside and tell us if it refreshes your recollection on any of these subjects.

The WITNESS. That doesn't refresh my recollection as to whether a suit had been filed at that time or not.

By Mr. STEFFEN.

Q. Does it refresh your recollection as to whether you talked about a suit with Mr. Avery?

A. Well, that would be the same thing, I think. No, it does not.

Q. You know, of course, that such a suit was filed?

A. I know such a suit was filed, yes, at some time, but whether it had been filed then or not, at the time of my call, I don't remember.

Q. The records will show that it had been filed previous to this talk.

2464 A. I don't know what the date of the talk was.

Q. Mr. Brown, do you remember the fact that a suit was filed by United States Gypsum Company against the Beaver Products Company? Do you remember that?

A. Oh, yes.

Q. And do you know what that suit was about?

A. Yes.

Q. What was it about?

A. They were trying to compel us to continue the manufacture of closed-edge board in the Beaver plants as they had been doing, and my recollection is—but you would again have to go to the records to be positive—that they wanted that extended to the other plants.

Q. That was your understanding at that time?

A. Well, that is my present recollection of it. It is not very reliable.

Q. And what was your position as to whether you would defend or not defend that suit?

A. Well, we would defend it.

Q. And did you actually put in an answer and defend the suit?

A. I don't know just how far we went, but an order from a United States court was entered requiring us to give a bond in case we went ahead without taking that license, as I remember it.

2465 Q. And were you a party to that bond?

A. Yes.

Q. How much was it for?

A. My recollection is that it was for \$2,000,000.

Q. I think it was \$1,000,000.

A. Was it \$1,000,000?

Q. Yes.

A. I thought it was two.

Q. Who else signed the bond with you, if anyone?

A. Elisha Walker and myself.

Q. Who was Elisha Walker?

A. I thought it was a million for each one, but I have forgotten.

Q. Now, Mr. Brown——

Justice GARRETT (interposing). The last question hasn't been answered. You asked him who was Elisha Walker.

Justice STEPHENS. Who was Elisha Walker?

The WITNESS. He was one of our Directors, head of Blair & Company.

Mr. STEFFEN. We would like a recess, Your Honor, at this time.

Justice STEPHENS. We will take a five-minute recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2466 Justice STEPHENS. Proceed, gentlemen.

By Mr. STEFFEN.

Q. Mr. Brown, we were talking about this litigation which the United States Gypsum Company had brought against the Certain-tyed Products Company in connection with the Beaver licenses, and I think you testified that your company decided to defend and put in an answer, is that correct?

A. We gave a bond, and went ahead. I don't know just how far it went.

Q. And do you recall what the nature of your defense was?

A. No.

Q. But there was a decision, as you testified, to put in an answer?

A. That is my best recollection.

Q. And do you recall having told your counsel to put in an answer?

A. I don't recall telling him, but my best recollection is that we did.

Q. Do you recall what you may have told him to say in the answer?

A. No.

Q. Directing your attention to the fact that you were out in Chicago and talked with Mr. Avery, and nothing came of your discussion, and that you thereafter  
2467 put in an answer, can you state what the nature of your answer was?

A. No.

Q. Can you state what you thought the purpose of the United States Gypsum suit was?

A. I suppose the purpose of any suit such as that would be to collect damages if we were infringing.



Q. Did they have any other purpose that you now remember?

A. I don't know.

Q. Well, I want your best recollection.

A. I don't know of any.

Q. You have no recollection at the moment?

A. Of what?

Q. Of what the probable purpose of the United States Gypsum Company's suit may have been for bringing an action against Certain-teed.

A. Well, such suits are generally to collect damages, aren't they?

Q. Well, will you look at the last paragraph of that memorandum which is Government's Exhibit 212, and see if that refreshes your recollection as to what you thought in 1928 was the purpose of the United States Gypsum Company's suit? Read the last paragraph carefully, and particularly the second sentence.

A. That doesn't refresh my mind. I don't know what that is.

2468 Q. Well, Mr. Brown, did you subsequently take out a license with the United States Gypsum Company?

A. I beg your pardon?

Q. Did you subsequently take out a license with the United States Gypsum Company under the closed-edge board patent covering all the properties of Certain-teed?

A. We did take one out, I don't know whether it was subsequently or not.

Q. Well, in order to get the dates clear, you signed your contract with the United States Gypsum Company on May 22, 1929. Now I want to ask you concerning that period between—

A. (Interposing) Please don't ask me about dates, I don't remember them.

Q. I understand that, but what I am getting at is that at the time in February, 1928, when you went to see Mr. Avery—that is established, and nothing came of it, that you have told us.

A. That was in February of 1928?

Q. Yes, let's get that fixed. It was in February of 1928.

A. I don't remember.

Q. But it is a matter of record. In February of 1928 you saw Mr. Avery.

A. All right.

Q. Then the next date to fix in your mind is May 22, 1929, a year and three or four months later, and at that time you signed a license agreement with USG.

A. Did we sign it then?

Mr. ADAMS. We will agree that it was signed on that date.

Mr. STEFFEN. I am merely trying to fix dates in order to inquire as to a period in between.

The WITNESS. I don't remember that.

Justice JACKSON. It has been admitted.

Mr. STEFFEN. May I show the witness the license agreement of May 22, 1929, to get that clear?

Justice STEPHENS. You may, yes.

Mr. STEFFEN. Will you show the witness Government's Exhibit No. 4, Mrs. Gillette?

(The document referred to was handed to the witness.)

By Mr. STEFFEN.

Q. Will you look at the last page of Government's Exhibit No. 4, which is page 25?

A. Yes.

Q. Is that your signature, Mr. Brown?

A. Yes.

Q. And if you will look at the first page of the agreement I think you will get the date.

A. The 22nd day of May, 1929.

Q. Now do you recognize that as your license agreement with the United States Gypsum Company?

A. It appears to be.

2470 Justice STEPHENS. Let me ask a question so as to get the mind of the Court clear. What is the approximate date which has been admitted in the record, of this conversation between Mr. Avery and Mr. Blagden and Mr. Brown?

Mr. STEFFEN. The 29th day of February, I believe.

Justice STEPHENS. 1928?

Mr. STEFFEN. Yes.

To be explicit, I might read the United States Gypsum Company's answer, which is a short paragraph, to our interrogatory No. 32. It says:

"As presently advised there were the following meetings: (a) — February 29, 1928, Chicago, Illinois. Present: Sevel L. Avery, president of United States Gypsum Company; George M. Brown, president of Certain-teed Products Company; and Augustus Blagden, president, Beaver Products, Inc., the assets of which latter company had just been purchased by Certain-teed."

That fixes the two dates of February 29, 1928, when Mr. Brown was in touch with Mr. Avery, and May 22, 1929, when they finally signed the license agreement.

Justice STEPHENS. Have you got those two dates clearly in mind now, Mr. Brown?

The WITNESS. I think so.

By Mr. STEFFEN.

Q. Do you recall having been out in Chicago at 2471 the time you signed the agreement with United States Gypsum Company on May 22, 1929—do you recall that occasion?

A. I recall being there, I don't recall the date.

Q. No, we are not interested in the date, we want you to tell us if you recall the occasion, and you say you do.

A. I recall being there. I am surprised if it was signed on that date, but maybe it was.

Q. Why are you surprised, Mr. Brown?

A. All right.

Q. I say, why are you surprised that it was signed on that date?

A. I didn't remember going through any of the actual signing at that time, I thought we had notified them that we would take a license, and that it probably came through later, but I have no recollection on it.

Q. How did you notify them, Mr. Brown, do you recall, by telephone or wire or by letter, or what?

A. We were with them, we were in a meeting with them in Chicago.

Q. I see.

A. And I presume—I have no specific recollection of it—I presume that we told them we would take a license, and to draw up the papers.

Q. And when you say "them", whom do you mean?

A. I mean the United States Gypsum, I mean Mr. 2472 MacLeish, primarily, I should say. He is the man that would—

Q. (Interposing) Draw up the papers?

A. He is the man that was doing things.

Q. But you recall definitely being at a meeting in Chicago with Mr. Avery and Mr. Blagden, at which you said you would sign the papers, is that right?

A. I think so.

Q. And is this the paper concerning which you are testifying?

A. I don't recall this, I signed it, but I don't recall it.

Mr. ADAMS. If it will shorten it any, we will agree that Mr. Brown signed Government's Exhibit No. 4 in Chicago on that day.

Mr. STEFFEN. We are not wanting to prove the date, your Honor, but we are trying to get the witness' memory refreshed on things that are clearly a matter of record.

Mr. ADAMS. I am trying to help Mr. Brown, too. There is no question from the point of view of the defense, that the agreement was signed by Mr. Brown in Chicago on that date.

By Mr. STEFFEN.

Q. Do you recall whether the matter of your \$1,000,000 bond came up at that time?

A. No, that was at a later time, I don't recall when that was.

2473 Q. Will you look at Government's Exhibit 232, which you have there?

A. This one?

Q. That is correct—and see if that refreshes your recollection as to the time when that bond was released.

A. Oh, when it was released?

Q. That is correct.

A. I think that the bond—my best recollection is that the bond was to be released when we took out the license.

Q. That the bond would be released when you took out the license?

A. That is my recollection.

Q. Will you look at that exhibit which you hold in your hand and see if that is your signature, and also note the date.

A. That is my signature.

Q. Now will you note the date of that exhibit?

A. The 22nd of May, 1929.

Q. That is the same date that the license agreement was signed?

A. Yes, it is.

Q. Now Mr. Brown, can you give us any reasons why you changed your position from that which you held in February and March, 1928, to the position you took on May 22, 1929, when you signed the license agreement and also got a release of your bond?

2474 A. I think I did tell you, but I will tell you again.

In our original position we felt that we would rather not take a license, but in the meantime we had found



that the trade wanted a closed-edge board; and worse than that, our Sales Department seemed to become hypnotized with the idea that we should make a closed-edge board, as sales departments sometimes have a way of doing; and the Manufacturing Department, Mr. Whittemore, who was here the other day, was of the opinion that they would like it for manufacturing reasons.

Then, I wouldn't be sure about just the time, but we began to raise questions that there might be other patents, either granted or brewing, or something, and it is my recollection, not very definite, that we thought there would be other patents coming along, and that we were very sure that we would want to use some of them, like that bundling patent where we were sure we wanted to use that, and then the one making the—

Q. (Interposing) The bubble board?

A. That was another one. And there was a multiplicity of patents, and more seemed to be brewing, and we thought we might just as well start and get them—and all of that seemed sufficient reason to change our mind. We probably had made up our mind the first time more from wishful thinking in handling our own business, than from a sound judgment of what we should do, simply as a matter of business.

2475 Q. But by May, 1929, you had decided that you would take out this license and perhaps other licenses?

A. We made up our minds before we ever went to Chicago, at least I knew that we were going to take out the license.

Q. Was the amount of your settlement with the United States Gypsum Company on their suit against the Beaver Products Company fixed at the time you went out to Chicago?

A. The amount of the settlement?

Q. Yes, sir.

A. Did we pay them anything? I have forgotten.

Q. I am asking you.

A. I have no recollection.

Q. Was it agreed before you went out to Chicago that your \$1,000,000 bond would be released?

A. I cannot recall, but I probably concluded that it was a safe assumption—I can't recall.

Q. That they would release the \$1,000,000 bond and you would take out a license?

A. I thought that would be a part of it, if we took out a license. I didn't think there would be any room for litigation after that.

Q. And having taken out a license, what effect did that have on the price of gypsum board?

A. I can't recall any, but you can look up the records if you want to know. The books will show.

2476 Q. I think they do, but I would like your recollection.

A. I have no recollection on it.

Q. I don't want the explicit price, I want to know whether it stabilized prices or did not stabilize prices, do you know that?

A. I think in the end it had a tendency toward stabilizing some prices—but the records show those things.

Q. I now show you, Mr. Brown, Government's Exhibit No. 317—

Justice JACKSON (interposing). That is a new one, isn't it?

Mr. STEFFEN. Yes.

By Mr. STEFFEN,

Q. (Continuing)—which purports to be a letter signed by you under date of May 15, 1929, addressed to Mr. S. L. Avery.

A. That is my signature.

Mr. STEFFEN. We offer Government's Exhibit No. 317 in evidence.

Justice STEPHENS. If there is no objection, it is received in evidence.

Mr. BROMLEY. We make only the usual objection, if the Court please.

Justice STEPHENS. Subject to the usual reservation with respect to declarations of alleged co-conspirators, it  
2477 is received in evidence.

(The document marked as Government's Exhibit No. 317 was received in evidence.)

By Mr. STEFFEN.

Q. In the last sentence there, Mr. Brown, you say that you were now prepared, or would like to be able to prepare yourselves "for prompt action whenever the matter may be ready for further consideration". Could you tell us what that means?

Justice JACKSON. You mean in the only sentence of the letter?

Mr. STEFFEN. Yes. I think you are correct.

The WITNESS. I presume we had made up our minds to sign this, and so notified them and wanted a copy of the agreement.

By Mr. STEFFEN.

Q. So you would be ready to sign when the matter was ready for further consideration?

A. So we would be able to take it up with the necessary people in our business.

Q. When you went out to Chicago on May 22, 1929, a matter of a few days after this letter was written, were there any other people besides the Certain-teed Products Company, present?

A. I think there were.

Q. Was Mr. Ebsary there? Could you name any-  
2478 body that was there?

A. Mr. Avery.

Q. That was United States Gypsum Company.

A. Yes.

Q. Were any of your competitors out there?

A. Yes, I think so, but I can't recall who was there.

Q. You have stated that you knew Mr. Haggerty of the National Gypsum Company—was he there?

A. I don't know.

Q. Was Mr. Ebsary there, perhaps, from the Ebsary Gypsum Company?

A. Well, perhaps, but I don't know.

Q. You are clear, though, that there were some others there?

A. Yes.

Justice JACKSON. Some others besides yourself, do you mean?

The WITNESS. Yes. Mr. Avery was one, I know he was there.

Justice JACKSON. Do you mean there were others besides yourself and Mr. Avery?

The WITNESS. Yes.

Justice JACKSON. From other companies?

The WITNESS. Yes.

Justice JACKSON. All right.

By Mr. STEFFEN.

2479 Q. Could you tell us whether Mr. Kling was there?

A. No, I cannot.

Q. Could your recollection be refreshed on that point?

A. I don't think so, I don't know how it would be.

Q. If I were to show you a paper or a telegram or a letter of yours, would that refresh your recollection, perhaps?

A. I will look at it and see.

Q. I now want to show you Government's Exhibit No. 318 for identification, which purports to be a telegram, or rather a copy of a telegram, from Mr. S. L. Avery, addressed to Mr. George M. Brown, under date of May 18, 1929, which was just three or four days before you signed the license agreement, and I want to ask you to look at that and see if that refreshes your recollection as to whether Mr. Kling was out at that meeting.

A. It does not.

Mr. STEFFEN. We offer Government's Exhibit 318, for identification, in evidence, which is a copy of a telegram taken from the files of the United States Gypsum Company, addressed to Mr. George M. Brown, dated May 18, 1929, and which is identical in content and identical in so far as the paper is concerned, with a telegram addressed to Mr. Eugene Holliand, which has already been introduced in evidence.

Mr. ADAMS. We object to it on the ground that no proper foundation has been laid, and I would like to point out that this paper did not come from the files of Certain-teed Products Corporation, and that there is no—

Mr. STEFFEN (interposing). We said United States Gypsum Company, your Honor.

Mr. ADAMS. I agree, but I am pointing that out to the Court in connection with the question of foundation, that there is no original telegram in so far as we have been able to ascertain in the files of the Certain-teed Products Corporation. I think the witness has merely testified that it did not refresh his recollection on the question of whether or not he saw Mr. Kling out there. He has not otherwise identified it.

Justice STEPHENS. Is there any objection by the United States Gypsum Company?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Well, the Court thinks it should be received in evidence with the usual reservation with respect to declarations of alleged co-conspirators, that is, received in evidence as respects all defendants other than Certain-teed, but the Court has some doubt, Mr. Steffen, as to whether it is sufficiently identified to be binding on Certain-teed, since the witness hasn't at least as yet stated that he received it.



Justice JACKSON. Was Mr. Kling connected with Certain-teed at all?

Mr. STEFFEN. He was with American.

2481 Justice JACKSON. That is what I thought. There is nothing to indicate that this refers to the Certain-teed contract at all, in this telegram.

Mr. STEFFEN. This purports to be a wire from Mr. Avery to Mr. Brown, concerning the proposed meeting at Chicago, at which the licenses were signed, the license agreements, and it refers to Mr. Kling.

Justice STEPHENS. I think the contents of it are relevant under the issues. The question is whether or not it has been sufficiently identified to be binding upon Mr. Brown's company.

Justice GARRETT. I don't remember that the witness has been asked if he recalls the telegram, or not.

Mr. STEFFEN. Do you recall, Mr. Brown, whether you received this telegram?

The WITNESS. I do not.

Justice STEPHENS. Well, it will be received in evidence, except as against Certain-teed. It is rejected as to Certain-teed because not sufficiently identified, no foundation having been laid to make it binding upon Certain-teed, it not having been shown that it was received or sent. But the Government may, perhaps, be able to prove that otherwise.

Mr. JOHNSTON. Why wouldn't that objection be good as to these other defendants, Texas and the others?

Justice STEPHENS. Well, no other defendants  
2482 made an objection, so far.

Mr. JOHNSTON. I was assuming that these objections, when made, were made for the benefit of all parties. That was the understanding.

Justice STEPHENS. The Court had not understood that Mr. Bromley's objections, on the part of United States Gypsum Company, as such, were made in behalf of the other defendants.

Mr. JOHNSTON. I am talking about Mr. Adams' objection.

Mr. OLIVER. Mr. Adams' objection would run to the rest of us.

Justice STEPHENS. I beg your pardon, I thought you were talking about Mr. Bromley's objection.

Mr. STEFFEN. We don't wish to make an issue out of it, your Honor.

Justice STEPHENS. We think, if the other defendants also object, that that is correct, that it is not identified suf-

ficiently to bind any of the defendants except United States Gypsum Company, which does not object on the grounds of lack of identification. So it is rejected except as against the United States Gypsum Company.

(The document marked as Government's Exhibit No. 318 for identification was received in evidence.)

By Mr. STEFFEN.

2483 Q. Do you recall having talked with Mr. MacLeish at the meeting in Chicago in May, 1929, when you signed the license agreement, Mr. Brown?

A. I do not recall.

Q. I want to show you, first, a letter which was addressed to you, Mr. Brown, under date of May 29, 1929, or rather a copy of a letter, and which has merely the word "President" at the foot. It is Government's Exhibit 319 for identification, and I will ask you to read it and state whether or not you recall having received it.

I would like to show you at the same time, Mr. Brown, Government's Exhibit No. 320 for identification, which purports to be a copy of a reply to Mr. Avery's letter of May 29, and ask you to read that in conjunction with Government's Exhibit 319.

A. Is this supposed to be from Mr. Avery?

Q. I want you to tell me what it is. It is supposed to be from Mr. Avery, yes, that is Government's Exhibit 319 for identification.

Will you read both Government's Exhibits 319 and 320, and state whether or not you recall either of those exhibits?

A. I don't recall. They have no marks by which I can identify them.

Q. They are copies of letters, in both instances, Mr. Brown. Are you familiar with the subject-matter  
2484 of the letters at all?

A. I don't recall these.

Q. You testified—

A. (Interposing) They seem to be about certain matters, here, but I have no recollection of them, and they have no mark by which I can identify them.

Q. The initials on Government's Exhibit 320 for identification, which is a copy of a letter dated June 4, 1929, are your initials at the foot of the letter, "GMB"?

A. Yes—you mean the typewritten initials?

Q. That is right.

A. Yes, those are my initials.

Q. And do you recall who the initials "LK" refer to?

A. Well, I know there was a Miss Keith, one of the secretaries was Miss Keith, and I presume that is her, but I know nothing about it.

Q. And does the reference to Fisher's Island mean anything to you?

A. Well, I often went to Fisher's Island.

Q. Did you have a yacht, Mr. Brown?

A. Yes, sir.

Q. And on occasion you did cruise to Fisher's Island, is that correct?

A. Yes, sir.

Q. Were you interested in promoting harmony  
2485 and friendship in the industry at this time?

A. I presume I was. I think we ought to have a "good neighbor" policy in lots of things.

Q. Do you have any doubt, Mr. Brown—this letter having been taken from the files of Certain-teed—that it is a copy of your letter?

A. I don't know anything about it.

Mr. ADAMS. Both of these letters are in evidence, I have just discovered, as Government's Exhibits 224 and 225.

Mr. STEFFEN. We have no further questions, then, your Honor. Thank you, Mr. Adams.

Justice STEPHENS. I presume you need not offer them, then, if they are already in evidence.

Mr. STEFFEN. Yes.

Justice STEPHENS. 317 has been offered and received, has it not?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. That is the only one of that group that you kindly handed the Court this morning, except that 318 is in evidence as against United States Gypsum Company alone?

Mr. STEFFEN. Correct.

Justice STEPHENS. And the others are not?

Mr. STEFFEN. Yes, that is right.

Justice STEPHENS. Then they will be returned to you through my law clerk.

2486

## CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Don't you remember, Mr. Brown, that in connection with the settlement which resulted in your signing the May 22, 1929, license, that your company agreed to and paid as damages, somewhere around \$64,000?

A. I don't remember that. Again the records would show those things.

Q. Referring now to the period of time prior to the occasion on which you signed the May 22, 1929, license agreement, isn't it a fact that you and your company would have taken a license under the Utzman and other patents long prior to May, 1929, if you could have gotten one without any price-fixing clause in it?

A. I think that that was one of the reasons for a great deal of criticism, but I am not sure, I don't think I could be sure as to what we would do.

Q. It is the fact, isn't it, that as you said you had made up your mind that Certain-teed should take the May 22, 1929, license before you went out to Chicago?

A. Yes, we did.

Q. Now, Mr. Brown, did you care at all what your competitors would or would not do with respect to taking out a similar license?

2487 A. I don't think so.

Q. And when you went out to Chicago, you went there for the purpose of negotiating the best possible terms that you could, didn't you?

A. Probably, but I think we knew what the terms would be. I think we had had the information about the license and all. Anyway, I am sure that we intended to go ahead with it.

Q. And you had determined, then, assuming that you did know the terms, to go ahead with it without regard to what other companies did about it?

A. Yes, sir.

Q. Referring specifically to Government's Exhibit 318, which is a copy of a telegram from Mr. Avery to you, you did not care whether Mr. Kling took a license or not, did you?

A. I don't remember anything about that telegram, but as nearly as I could define our attitude, we didn't care what others did, and we would have preferred, if we could have had the say about it, that some of them shouldn't have the right to make it, because we didn't think they would respect the obligations that we had to respect.

Q. You mean by that, that you thought that some of your competitors, if they took licenses, would not respect the prices which United States Gypsum fixed?

A. Yes, and that we would.

Q. And that you would?

2488 A. Yes, and it would be annoying.



Q. These Exhibits 224 and 225, one of which is Mr. Avery's letter to you of May 29, 1929, and the other your reply of June 4, 1929, refer, I believe, to the fact that your company took a second license which we here refer to as the October or November license, of 1929, do you recall that?

A. No, sir.

Q. Do you remember, Mr. Brown, that the Certain-teed Company took a license in or about November, 1929, under the starch or foam or bubble-board patents?

A. We took some additional licenses, and those were some of them.

Q. Now was it still your position, when you took those licenses, that you were opposed to having your prices fixed by USG or anybody else?

A. My best recollection is that we would always have opposed fixing the prices if we could have done so.

Q. And isn't it the fact, that you finally agreed to such a provision because that was the only basis on which you could get the license from USG?

A. Yes, sir.

Q. And it is the fact, isn't it, that with respect to the November, 1929, license, again you felt that it was highly desirable and beneficial to your company to have the right to use the Haggerty starch and the Roos bubble-board patents, as well as the others?

A. We had reached that conclusion.

Q. Now at any time prior or subsequent to your taking these licenses, did you have any understanding with Mr. Avery or anybody else that he would raise gypsum board prices?

A. No, sir.

Q. Did you ever have any discussion with Mr. Avery as to what he would or would not do with respect to the price that he fixed on the patented gypsum board?

A. We had nothing to do with fixing prices, and those things were not discussed.

Q. And isn't it a fact, Mr. Brown, that you never had any understanding with Mr. Avery or anybody else about the prices which you should charge for plaster?

A. We never had any understanding with anybody, and if there is anything in the record to indicate that anybody had an understanding with anybody else, I would like to see it.

Q. Well, your testimony is that you never were party to any understanding, or never knew of any understanding

or agreement about plaster prices, or block prices, or tile prices, or Keene's cement prices, or any other prices, isn't that right?

A. I never had any, and I don't think that the others did.

Q. And it is a fact, isn't it, Mr. Brown, that you never had any understanding—

2490 Mr. STEFFEN (interposing). I would like to object to a portion of that last answer. I think what Mr. Brown thinks is probably subject to being stricken.

Justice STEPHENS That may go out. I refer to his statement—and I assume that you do—that he thinks that no one else did.

Mr. STEFFEN. Yes.

Justice STEPHENS. That may go out.

By Mr. BROMLEY.

Q. And it is a fact, isn't it, Mr. Brown, that so far as you are concerned you never had any agreement or understanding with Mr. Avery, or anybody in the United States Gypsum Company outside of those understandings that were contained in the written license agreements?

A. Those are the only agreements.

Q. Now I would like to show you Defendants' Exhibit 15 for identification.

(Discussion off the record.)

Mr. BROMLEY. Unless there is objection, I would like to show the witness a photostat of Defendants' Exhibit 15 for identification, and ask him merely if he can identify the signature to that letter.

The WITNESS. I cannot.

By Mr. BROMLEY.

Q. And likewise, I would like to show you a  
2491 photostat of Defendants' Exhibit No. 17 for identification, and ask you if you can identify the handwriting on that exhibit as being the handwriting of Mr. C. O. Brown.

A. That is C. O. Brown's initial signature, that is the only thing I can identify.

Justice STEPHENS. Mr. Brown, are you sure you understood the question Mr. Bromley asked you? Judge Jackson thinks perhaps you did not understand the question with respect to Defendants' Exhibit 15, as to whether you can identify that signature on there.

The WITNESS. The one of Mr. Henley?

Justice STEPHENS. Yes.

The WITNESS. No, I could not identify it.

Justice JACKSON. You don't know his handwriting?

The WITNESS. No, I don't.

Justice JACKSON. Then you did understand the question.

The WITNESS. Yes.

Mr. STEFFEN. I would like to ask if he understood the question with regard to Defendants' Exhibit 17. Did he identify the handwriting?

Justice STEPHENS. He identified the initials, but not the handwriting.

The WITNESS. "COB" is C. O. Brown's initial signature.

Mr. STEFFEN. Thank you.

Mr. BROMLEY. That is all.

2492 Justice STEPHENS. Is there any cross-examination by counsel for other defendants?

(No response.)

Justice STEPHENS. Is there any redirect?

Mr. STEFFEN. No redirect, your Honor.

Justice STEPHENS. This witness may be excused, then, gentlemen?

Mr. STEFFEN. We will excuse him.

Justice STEPHENS. Do you need him further, Mr. Bromley?

Mr. BROMLEY. No.

Justice STEPHENS. You may be excused when we go into recess, Mr. Brown, and thank you for attending the Court.

You may announce a recess until one forty-five.

(Thereupon, at 12:12 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

2493

#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. You may proceed, gentlemen.

Mr. KNUFF. Mr. Robert M. Nelson.

Thereupon, ROBERT M. NELSON, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name is Robert M. Nelson, is that not correct?

A. Yes, sir.

Q. With what company are you now associated?

A. With the Savannah & Atlanta Railway Company.

Q. Savannah Railway Company?

A. Savannah & Atlanta Railway Company.

Q. Were you ever connected with the Certain-teed Products Corporation?

A. Yes, sir.

Q. I believe you entered their employ in 1914, is that correct?

A. Yes, sir.

Q. And you left Certain-teed Products Corporation in 1936, is that correct?

2494 A. Yes, sir.

Q. And at the time you left the Certain-teed Products Corporation, what was your position?

A. I was Vice President and Treasurer.

Q. You are no longer associated with Certain-teed Products Corporation or any of its affiliates, is that correct?

A. Yes, that is correct.

Mr. KNUFF. May we have Government's Exhibit 210, please?

(Government's Exhibit 210 was handed to the witness.)

By Mr. KNUFF.

Q. Mr. Nelson, will you look at Government's Exhibit 210, and read it, please?

Mr. BROMLEY. That is for identification only, isn't it?

Mr. KNUFF. 210 for identification.

By Mr. KNUFF.

Q. You have read that document, have you not?

A. Yes, sir.

Q. The "A. Whittemore" in the first line is Mr. Auden-reid Whittemore, is that correct?

A. Yes.

Q. And "C. O. Brown" is Mr. Claude O. Brown?

A. Yes.

Q. And "L. R. Walker" is the gentleman that was formerly connected with the Certain-teed Products Corporation and later with Sears-Roebuck & Company, is that correct?

2495 A. Yes.

Q. And of course, the next gentleman is yourself?

A. Yes.

Q. And Mr. Adkins and Mr. Chaffee were members of the Cravath firm, is that correct?

A. No, Mr. Adkins was, but not Mr. Chaffee.

Q. Mr. Chaffee wasn't, but Mr. Adkins was?

A. Yes.



Q. Do you recall that meeting, Mr. Nelson?

A. Well, only vaguely.

Q. Do you recall that Mr. Walker outlined briefly the history of the patent situation on the closed-edge board?

Mr. ADAMS. I object to that. In view of the witness' statement that he remembers the meeting only vaguely, I submit that he shouldn't be led, with respect to this line of questioning.

Justice STEPHENS. The objection is to the form of the question as leading?

Mr. ADAMS. Yes.

Justice STEPHENS. Read the question.

Mr. ADAMS. And suggestive as well as leading.

(The question was read by the reporter.)

Justice STEPHENS. Well, it is preliminary, I think. Objection overruled.

By Mr. KNUFF.

2496 Q. Do you recall that?

A. Well, all of that is only vague in my mind, any part of it.

Q. Well, will you read the paragraph beginning, "Mr. Walker stated"—would you read that paragraph, please?

A. Where is that?

Q. That would be on the first page, the third full paragraph,—“Mr. Walker stated”, and from then on. Read that to yourself.

A. All right.

Q. Do you recall whether Mr. Walker took the position that if they switched to an open-edge board, Certain-teed would lose a substantial volume of business?

Mr. ADAMS. I respectfully object to that on two grounds: first, that there is no statement by the witness that he even recalls Mr. Walker being present at the conference, if there was one; secondly, that it suggests an answer from the memorandum, which the witness has not identified in any way.

Justice STEPHENS. Objection sustained.

By Mr. KNUFF.

Q. Was Mr. Walker at any conference as indicated in Exhibit 210 for identification, or were those persons mentioned in the first line at any conference at or about that time?

A. Well, I don't recall definitely. I suppose they might have been, but I don't recall these circumstances.

2497 Mr. ADAMS. I respectfully move to strike out what he supposes, on the ground that it is a mere speculation on the part of the witness.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. You testified before the Grand Jury on the 20th day of May, 1940, did you?

A. Yes, sir.

Q. Do you recall Mr. Haddock asking you this—

Mr. BROMLEY (interposing). I object to this use of the Grand Jury minutes. I don't think they should be read into the record.

Justice STEPHENS. You may display them to the witness, Mr. Knuff.

Mr. KNUFF. I was just following what had been done in the *Madison Oil* case.

Justice STEPHENS. Well, I am not entirely familiar with what was done there, and happily we are not trying that case in this Court.

Mr. KNUFF. The Supreme Court has approved of what was done in the *Madison Oil* case.

Justice STEPHENS. I don't deny you the right to use the minutes. I think the proper thing to do is to show them to the witness and see if they refresh his recollection.

By Mr. KNUFF.

2498 Q. I want you to read, Mr. Nelson, from the bottom of page 1988 through 1989.

Mr. ADAMS. While the witness is reading this, I should like to record an objection to the use of the Grand Jury minutes for this purpose.

Justice STEPHENS. For the purpose of refreshing recollection?

Mr. ADAMS. You have already ruled upon that, but this is with respect to this offer.

Justice STEPHENS. I think that objection is not well taken. I think the Courts have indicated that after the Grand Jury proceedings have been closed, so that the reason for secrecy is past, that they are properly usable. I think the way to use them is to show them to the witness rather than put them in the record.

Mr. ADAMS. May I also have an opportunity, Your Honor, to look at these minutes before the witness answers?

Justice STEPHENS. Yes, they will be shown to counsel and the Court before they are finally dispensed with.

Mr. ADAMS. Perhaps Your Honor did not hear exactly what I said. I should like to have an opportunity to see them before the witness answers.

Justice STEPHENS. Yes, that is correct.

Have you read them, Mr. Nelson?

The WITNESS. Yes, sir.

2499 Justice STEPHENS. Show them to counsel, and then to the Court.

Mr. KNUFF. Will the record show that they are being exhibited now to defendants' counsel?

Let the record show that they are now being handed up to the Court.

Mr. ADAMS. Might I hear the pending question, please, Your Honor?

Justice STEPHENS. Read the series of questions and answers leading up to the objection.

(The record was read by the reporter.)

Mr. ADAMS. I take it that the minutes were exhibited to him for the purpose of refreshing his recollection on some point, and it is that question that I wanted to find out about.

Justice STEPHENS. I don't want to conduct the examination, but it is the Court's understanding that the Grand Jury minutes are shown him for the purpose of asking him whether or not he recollects now a discussion which is mentioned in proposed Exhibit 210; is that right?

Mr. KNUFF. Yes.

Mr. ADAMS. If that is the case, Your Honor, his recollection hasn't been exhausted on that point, as I recall it. I thought we were talking about who was present at the conference. It was at that point in the questioning  
2500 that he was shown the minutes.

Justice STEPHENS. Read back the last several questions.

(The record was read by the reporter.)

Justice STEPHENS. You may ask the question now, Mr. Knuff.

By Mr. KNUFF.

Q. Did you attend any conference on or about February 2, 1928, at which Mr. Walker, Mr. C. O. Brown, Mr. Whittemore, Mr. Adkins, and yourself were present?

A. This letter or memorandum would indicate that I did, but I have no present recollection of any of the details of it.

Mr. ADAMS. I respectfully move to strike out the witness' answer in so far as he refers to what some memorandum states as indicating who was present.

Justice STEPHENS. That may go out.

By Mr. KNUFF.

Q. Have you read your grand jury testimony?

A. Yes, sir.

Q. Does that refresh your recollection at all?

A. Well, that was some 3 years ago, I believe, and I may have recalled these situations then more than I do now. As I say, I recall that there were meetings, but I don't recall just what anybody said or just who was present.

Q. Do you recall any meeting that you attended  
2501 with Mr. Walker where he outlined the history of the patent litigation on closed-edge board?

A. Well, it is rather vaguely in my mind that there were such meetings.

Q. And do you recall at the same meeting or at the same time you took the position that Certain-teed should not, as a matter of business policy, pay a royalty on an open-edge board.

Mr. ADAMS. I object to that as being suggestive. The witness has not been asked what took place at the meeting.

Mr. KNUFF. He says he has a vague recollection. Now I am just trying to search what his recollection is.

Justice STEPHENS. That is true, Mr. Knuff, but the place where leading questions are especially undesirable is where the witness does have a vague recollection, and there a leading question might be likely to suggest the answer to him. You are at liberty to probe the witness' recollection as far as reasonably proper, and ask him if he does recollect anything on that subject and what he collects.

Mr. KNUFF. All right, suppose I put it this way:

By Mr. KNUFF.

Q. Did you ever take the position, sir, that Certain-teed should not pay a royalty on open-edge board?

A. I think I did.

Q. And did you ever take that position with Mr. Walker?

2502 A. I am not certain whether it was with Mr. Walker or others.

Q. Do you recall at any meeting that you, Mr. Whittemore, and Mr. Walker and C. O. Brown attended, that Mr.



C. O. Brown took the position that he was not in favor of giving up their right to make open-edge board?

Mr. ADAMS. I object, Your Honor. I think we are right back to the same point where we began. He is again suggesting answers to the witness. I mention that particularly in view of the fact that he says he can't remember who was present at these meetings.

Justice JACKSON. Did I get your former question right, Mr. Knuff, that his position was that he shouldn't pay royalties on open-edge board?

Mr. KNUFF. That is right, that was the position that this witness took.

Mr. ADAMS. I respectfully object to that, because I don't think that is the fact.

Justice JACKSON. On open-edge board?

Mr. KNUFF. On open-edge board.

Mr. ADAMS. I don't think counsel has stated the fact.

Mr. KNUFF. The agreement provides that they are to pay royalty on all types of board manufactured, not royalty upon just the closed-edge board.

Justice JACKSON. I wanted to be sure I understood you.

2503 Mr. ADAMS. I don't care what the agreement provides, counsel can refer to that, but I don't think he should refer to the witness' position.

Justice STEPHENS. The questions are leading, and we are bound to sustain the objection. Why don't you ask him, Mr. Knuff, what he remembers on that subject? It is in his mind now, and the harm has been done. Ask him whether he has any recollection on the subject we have been discussing, and what his recollection is.

If you have a recollection, say so; and if you don't, feel free to say you don't.

By Mr. KNUFF:

Q. Do you recall what took place at this meeting on February 2, 1928, and if you do recall, tell us what you do recall?

Mr. ADAMS. I object to that on the ground that it assumes a fact not in evidence, to-wit, that there was a meeting on February 2, 1928.

Justice STEPHENS. You see, Mr. Knuff, this exhibit isn't in evidence. There is nothing in the record that indicates there was a meeting on that date. The witness has not so testified. So again the objection is correct. I realize the difficulty you are under, and I want to give the Govern-

ment all proper latitude to find out what this witness knows, but we must sustain objections to clearly  
2504 leading questions in respect of a vague recollection.

Objection sustained.

Let me ask the witness one or two questions.

Do you recollect any meetings at or about the date which Mr. Knuff has mentioned, at which the subjects he has been asking you about were discussed, or don't you?

The WITNESS. Not specifically, sir. As I stated, I just recall in a vague way that there were meetings, and this subject was discussed among the various officers and department heads.

Justice STEPHENS. Could you place approximately the time when those meetings were held, with reference to dates or other events?

The WITNESS. Well, probably meetings were held in this period.

Justice STEPHENS. What period? Don't look at the exhibit, testify from your own recollection. In what period?

The WITNESS. Well, in the period when we were negotiating for the purchase of the Beaver assets, and subsequent to that.

Justice STEPHENS. Do you remember about when that was?

The WITNESS. That was in the early part of 1928.

Justice STEPHENS. Do you remember any persons that were present at such meetings?

The WITNESS. Not without looking at some minutes or records that would refresh my memory.  
2505

Justice STEPHENS. Very well.

By Mr. KNUFF.

Q. Well, after you have looked at that Exhibit for Identification No. 210, does that refresh your recollection, sir?

A. In what way?

Q. As to who was present.

A. On this date?

Q. At or about that time.

A. I simply can not specifically, now, remember definitely who was at these meetings.

Q. Do you remember anybody that was at those meetings at about this time, that is, just about the time that Certain-teed was negotiating to take over the Beaver properties?

A. Well, I am morally certain that Mr. Walker was present, and Mr. Adkins, and C. O. Brown, and Mr. Whittemore. But I can not place the circumstances and the time or the place.

Mr. ADAMS. I move to strike out the portion of the witness' answer concerning which he is "morally certain", as it is quite evident from his answer that he is not testifying from his recollection as to who was there, but merely from his assumptions.

Justice STEPHENS. Well, that is not quite clear.  
2506 Probably it is his inference. But Mr. Knuff is about to ask another question which might possibly clear that up.

By Mr. KNUFF.

Q. I was going to ask—what do you mean by "morally certain"? Do you mean by that that you haven't any doubts?

A. No, I would mean that there was a probability that these gentlemen were present.

Mr. ADAMS. Then I move to strike out the answers to both questions.

Justice STEPHENS. They may go out.

By Mr. KNUFF.

Q. Did Mr. Walker ever state to you what his position was with reference to manufacturing closed-edge board at the Beaver plants?

Justice STEPHENS. Just answer that yes or no, if you recollect.

The WITNESS. I don't recall.

By Mr. KNUFF.

Q. Did C. O. Brown ever state to you what his position was as to whether or not Certain-teed should give up the right to make open-edge board without paying royalties?

A. I don't recall that now.

Q. Do you know what C. O. Brown's position was?

A. No, I don't remember.

Q. Do you know what Walker's position was?

2507 A. Well, I don't recall what those statements were, now. I know there were discussions pro and con. One was in favor of one thing and others were in favor of other things, but I can't think of the definite position that anybody took, at this time.

Q. Will you state what positions they did take?

Mr. ADAMS. I object to that. He has just stated that he is unable to.

The WITNESS. I don't recall that, now.

Mr. KNUFF. Will you read his answer to me, please?

(The answer was read by the reporter.)

By Mr. KNUFF.

Q. Will you just tell us what you can remember about those discussions?

A. Well, there were general discussions that we would like to keep our business on a basis which would not involve the fixing of prices, and especially on the open-edge board, because we had started that on our own account in 1926, I believe, and the suit that was brought on as a consequence of our taking over the Beaver assets brought up a number of questions as to what our policy ought to be. But specifically, I can't say, these many years later, just what position each one of us took.

Q. Was there any person in favor of taking out a license with USG for the Beaver plants as well as for the 2508 Certain-teed plants?

A. Well, I believe that that was discussed, but I don't know who talked about it.

Q. Do you recall what Mr. Brown's attitude was?

Justice JACKSON. Which Mr. Brown?

Mr. KNUFF. C. O. Brown.

The WITNESS. Well, he was generally in favor of trying to continue with the sale of the open-edge board, and not to take over the license on the closed-edge board.

By Mr. KNUFF.

Q. And what was George M. Brown's position?

A. Oh, I beg your pardon; I thought you asked me about George M. Brown.

Q. No, I asked you as to C. O. Brown. The answer that you gave, then, related to George M. Brown?

A. Yes.

Q. And what was C. O. Brown's position?

A. Well, frankly, I am not certain of it, at this time.

Q. I wonder if you would read your Grand Jury testimony from page 1990 through to the middle of page 1991, and see whether that refreshes your recollection.

Mr. BROMLEY. We would like to have the record show our general objection to the use of the Grand Jury minutes for any purpose.

Justice STEPHENS. The objection may be shown, 2509 and it is overruled.

The WITNESS. Yes, sir.

Justice STEPHENS. Hand it to counsel, Mr. Marshal.

(Grand Jury minutes handed to Government counsel.)

Mr. KNUFF. Let the record show that the Grand Jury minutes are being handed to defendants' counsel.



(Grand Jury minutes handed to defendants' counsel.)

Mr. KNUFF. Now let the record show that the Grand Jury minutes are being handed to the Court.

(Grand Jury minutes handed to the Court.)

By Mr. KNUFF.

Q. Now does that refresh your recollection, Mr. Nelson, as to what Mr. C. O. Brown's position was?

A. I think so, yes.

Q. What was his position?

A. Well, that he didn't want to give up the right of Certain-teed to make open-edge board without paying royalties.

Q. You mean he didn't want to pay royalties on open-edge board?

A. Yes.

Q. And that was the position that Mr. C. O. Brown took?

A. I believe so.

Q. And what position did you take?

A. Similar to that one.

Q. Did you ever see the exhibit that you have 2510 before you now? Did you ever see that before?

Justice STEPHENS. Which one is that.

Mr. KNUFF. Exhibit 210.

The WITNESS. I don't know if I have or not.

By Mr. KNUFF.

Q. Did it ever come to your attention while you were an officer of Certain-teed?

A. It probably did.

Q. Do you have any doubts as to whether or not it did?

Mr. ADAMS. I object to that, and I also respectfully move to strike out the last answer as being a mere speculation on the part of the witness, and respectfully suggest that the question is whether or not he recognizes it.

Justice STEPHENS. Let me ask the witness: Do you mean when you say that it probably came to your attention, that that is your inference as a matter of probability, or that you recollect it?

The WITNESS. I don't definitely recall it, but my statement means that I probably did see it. There is a familiarity to it, but I can not state positively that I have seen it.

Justice STEPHENS. Well, I suppose the answer will have to go out.

Of course you may show, Mr. Knuff, if you wish to, by interrogating the witness or calling other wit-

2511 nesses, that this would naturally have reached his attention as an officer of the company at or about this time, and then the Court may be asked to draw the inference that he probably did see it. But apparently he is only speculating as to whether he saw it.

By Mr. KNUFF.

Q. Well, as an officer of the company, would you see memoranda of this character, sir?

A. Yes.

Q. And that would normally come to your desk as one of your duties with the corporation?

A. Not in all cases. Some would and some would not.

Q. Is there any doubt that you saw that?

Mr. ADAMS. I respectfully object to that again, Your Honor.

Mr. KNUFF. Is there any doubt in this witness' mind that he saw that before—he can say there is or there isn't.

Justice STEPHENS. That is true, but if he says that, Mr. Knuff, on the theory that he infers that he must have seen it, that is not stating whether he did see it.

Mr. KNUFF. If there is no doubt in his mind, I think that that would be certainly evidence that he saw it.

Mr. ADAMS. It would be the basis of the question, as Your Honor pointed out. He may think, as a matter of probability, that he saw it, and therefore has no  
2512 doubt; or he may have seen it. The issue is—did he see it or didn't he?

Justice JACKSON. Why not ask him that very question?

Mr. KNUFF. I did, and he said he probably did, and I meant to ask him what he meant by "probably", and asked him if he had any doubt.

Justice STEPHENS. We are now in the process of trying to identify a memorandum, and the objection is well taken.

The WITNESS. Well—

Justice STEPHENS. What did you start to say, Mr. Witness?

The WITNESS. If my name or initials were on it, or something, so that I could identify it, I would do so.

Justice JACKSON. Do you remember whether or not you ever saw that?

The WITNESS. No, sir.

By Mr. KNUFF.

Q. I show you, sir, what has been marked for identification as Government's Exhibit 321, the same being a mem-

orandum dated February 23, 1928, on the right-hand side of which appears "Robt. M. Nelson, Treas.", and on the left-hand side of which appears, "Mr. George M. Brown, Pres."

I ask you to look at that, and tell us whether you prepared that memo?

Justice STEPHENS. That is a new proposed exhibit, 2513 isn't it, Mr. Knuff?

Mr. KNUFF. Yes, it is one of those that I passed up to Your Honors.

Justice STEPHENS. This is the one which purports to bear what date, Mr. Knuff?

Mr. KNUFF. February 23, 1928, Your Honor.

Justice STEPHENS. I am sorry, but I am still confused.

Justice GARRETT. It is the second one in the set.

Mr. KNUFF. This is what it looks like. (Indicating.)

Justice STEPHENS. Thank you. Are there two pages?

Mr. KNUFF. Just one page, Your Honor.

By Mr. KNUFF.

Q. Did you prepare that memorandum, Mr. Nelson?

A. I am not certain, but the initials on the left-hand corner, "G.P.K." and "B.B.W.", are in my writing.

Q. That is your handwriting?

A. Yes, sir.

Q. And do you recognize the stenographer's initial, "S", after your name?

Mr. ADAMS. I think he has identified it sufficiently—

Mr. KNUFF (interposing). We offer it in evidence as Government's Exhibit 321.

Justice STEPHENS. Any objection?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. Received, subject to the usual 2514 reservation concerning the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 321, was received in evidence.)

By Mr. KNUFF.

Q. I show you what has been marked for identification as Government's Exhibit No. 322, the same being a memorandum dated March 2, 1928, on which appears, on the right-hand side, "Robt. M. Nelson, Treas.—S.", and I want you to look at it and tell us whether or not you prepared that?

A. What did you ask me?

Q. Do you recognize that as a memorandum that you prepared?

A. I do. I find my memo here in my writing, "USG Suit".

Q. And you recognize that as a memorandum that you prepared?

A. Yes, sir.

Q. Now I want you to look at Government's Exhibit 212 for Identification, please.

A. All right.

Q. Now, Mr. Nelson, you will notice that the exhibit which you have in your hand, which is Government's Exhibit 212 for identification, bears date of March 1, 1928—do you notice that?

2515 A. Yes, sir.

Q. And Government's Exhibit 322 for Identification, which is the memorandum that you have identified, bears date of March 2, 1928, do you notice that?

A. Yes, sir.

Q. You will notice the heading on Government's Exhibit 212 for Identification is, "Memorandum Regarding the Possibility of Making Plaster Board under the Royalty Basis," and you will notice that the same heading appears on Government's Exhibit No. 322. Do you notice that?

A. Yes, sir.

Q. And you will notice Government's Exhibit 322 for Identification starts out, "Answering yours of March 1st." Do you notice that?

A. Yes, sir.

Q. Government's Exhibit No. 322 was in answer, was it not, to Government's Exhibit 212?

Mr. ADAMS. I object to that.

Mr. KNUFF. Just a moment, he can answer that yes or no.

Mr. ADAMS. The answer is suggested to him by the question. The question is—does he know whether or not it is.

Justice STEPHENS. The witness will understand the question that way, I think.

You are being asked as to whether or not the Exhibit 322 was an answer to Exhibit 212 for Identification, 2516 if you know, if you recollect.

Mr. ADAMS. I think it is fair for me, in that connection, to point out, Your Honor, that Mr. Knuff described Exhibit 212 without stating that it was 212 for Identification.

Justice JACKSON. He since has corrected that. When he referred to it again he said "for Identification".



Mr. ADAMS. I am sorry.

Justice STEPHENS. You can take your time and read both of them carefully, if you wish. Don't be hurried.

See if you can answer whether or not 322 is in answer to 212.

The WITNESS. Must this be a yes or a no answer?

Justice STEPHENS. No, you don't have to answer yes or no if you can't answer that way. If you don't recollect, you can say that. State whatever is the truth.

The WITNESS. I can not positively state that the letter of March 2 is an answer to the letter of March 1.

By Mr. KNUFF.

Q. What is your best recollection?

A. I believe it is.

Q. That is your best recollection now?

A. Yes, sir.

Q. You believe that it is an answer?

A. Yes.

Mr. ADAMS. Well, I respectfully suggest that that  
2517 is not a recollection, it is merely a belief, and I move to strike it out.

Justice STEPHENS. Well, I will hear you further, Mr. Adams, but that seems to me cutting it a little bit fine. Here is the Treasurer and Vice President of the company at that time. He identifies 322 as a letter or a memorandum which he wrote, and it seems to relate to the same subject matter as proposed Exhibit 212; and, whether you phrase it in terms of his best recollection or in terms of his belief, he ought to know as an officer of the company whether these two memoranda are related, I should think. And if he does, I think he could tell us so.

Mr. ADAMS. I can express a belief as to whether these two memoranda are in any way connected, as can Your Honor—apparently you do have a belief about it. But it seems to me that the important question here is what this witness recalls.

Justice STEPHENS. That is true in a highly technical sense, but it seems to me we are getting to the point where we are dealing with weight of identification rather than actuality of identification. It is true you might express a belief, or the Court might express a belief, but that would have to be based on the mere words written upon these memoranda; whereas, this witness brings to the question

the knowledge of an officer of the company who dealt  
2518 with this subject matter. If he thinks it is probable

that these memoranda related to each other, it would seem to the Court that that is some identification.

2519 Mr. ADAMS. I think that Your Honor has undoubtedly stated the situation accurately. My difficulty is with what the witness actually knows about it. It might be that at the proper time I will be able to clear that up by asking him some questions myself.

Justice STEPHENS. You may do that when it comes your turn to examine. The objection is overruled. You may proceed.

Mr. ADAMS. Well—

Justice STEPHENS (interposing). You moved to strike the answer, I believe.

Mr. ADAMS. Yes, that was my last remark.

Justice STEPHENS. The motion is denied.

Mr. KNUFF. We now offer in evidence, if Your Honor please, Government Exhibits 212 and 322, and in connection with both of these exhibits, in addition to the circumstances heretofore referred to, I want to say to the Court that these both have been received under subpoena from the Certain-teed Products Corporation, and they bear the Certain-teed Products Corporation's, or someone's identification number as X-324. Also, this witness is positive in his identification of Exhibit 322, and he believes that 212 is in answer—rather that 322 is in answer to Government's Exhibit 212.

Justice STEPHENS. Just so the record will correctly state the facts, the identification items which are on the  
2520 photostats are not X-324, but X-318 on Exhibit 212—

Mr. KNUFF (interposing). And X-324 on Exhibit 322.

Justice STEPHENS. Thank you.

Mr. ADAMS. May I examine, Your Honor?

Justice STEPHENS. Yes.

Justice GARRETT. Had Mr. Knuff concluded?

Justice STEPHENS. No, Mr. Adams is asking on voir dire as to the propriety of introducing the exhibits.

Justice GARRETT. I see.

Mr. ADAMS. Mr. Nelson, you told us a little earlier that there were a number of discussions among the various officers of the company on this subject?

The WITNESS. Yes, sir.

Mr. ADAMS. And those included the department heads, is that correct?

The WITNESS. Yes, sir.

Mr. ADAMS. And I suppose that some of those department heads made various memoranda, is that right?

The WITNESS. Yes, sir.

Mr. ADAMS. And you were possibly concerned with some of those memoranda?

The WITNESS. Yes.

Mr. ADAMS. This was a pretty brisk situation right around that time, wasn't it, with the U.S.G. suit pending, and all that sort of thing?

2521 The WITNESS. Yes, it was.

Mr. ADAMS. And undoubtedly there were a number of memoranda that were exchanged among the various officers of the company, isn't that right?

The WITNESS. Yes.

Mr. ADAMS. Now you knew that George M. Brown couldn't identify that memorandum at all, didn't you, that is Exhibit 212 for Identification?

Mr. KNUFF. He wasn't asked to identify it.

Mr. ADAMS. He was shown the exhibit this morning, and I will refer to my own notes which I am sure may not be accurate, but what I took down was that he was shown the exhibit and he said that there were plenty of them around the office but that he didn't know what it was, and he was asked if those were his stenographer's initials and he said, "I can't recall, even, that it was my stenographer". I wrote in my notes that he said, "I don't know what it is".

Justice STEPHENS. The Court recollects Mr. Brown being examined on 210—

Mr. KNUFF (interposing). Yes, he was asked about 212. My recollection was faulty.

Justice STEPHENS (continuing) —and I believe also on Exhibit 212.

Mr. KNUFF. I confess that my recollection was faulty.

Justice STEPHENS. I read it at the time and I remember certain statements in it.

Mr. ADAMS. So you knew that Mr. George M. Brown couldn't identify that as his memorandum at all?

The WITNESS. Yes.

Mr. KNUFF. It still is immaterial whether George M. Brown could identify it, and we are objecting on that ground.

Justice STEPHENS. The witness is being examined on voir dire to see whether or not he can identify the exhibit as he said he could on direct examination. I think thus far it is not improper.

Mr. ADAMS. As far as you are concerned as to that memorandum, Exhibit 212 for Identification, you don't have any recollection about that at all, do you?

The WITNESS. No.

Mr. ADAMS. And you can't recall ever having seen that paper before, isn't that true, that is Exhibit 212?

The WITNESS. No, I don't recall it.

Mr. ADAMS. And as far as your's being an answer to it, as far as you are concerned isn't this true, Mr. Nelson, that when you say that you believe that Exhibit 322 for Identification is an answer to 212, it is just a speculation on your part, isn't it?

The WITNESS. Well, that is hard to say whether it is a speculation.

Mr. ADAMS. Well, let's put it this way.

2523 Mr. KNUFF. Let the witness finish, please.

Mr. ADAMS. I thought he had finished. Had you completed your answer?

The WITNESS. Yes, I had.

Mr. ADAMS. Certainly as far as you are concerned you don't know anything about Exhibit 212 at all, do you?

The WITNESS. No.

Mr. ADAMS. And as far as Exhibit 322 is concerned the only reason that you can identify that at all is because it happens to have your handwriting on it, isn't that true?

The WITNESS. Yes, that is true.

Mr. ADAMS. You don't presently recall the statements that are made in 322, do you, which is the one you say has your handwriting on it and therefore you identified it?

The WITNESS. Yes, that is right.

Mr. ADAMS. But you don't recall the statements that are made in that memorandum, do you?

The WITNESS. No, not now.

Mr. ADAMS. And you don't know, when you said, "Answering yours of March 1st", you don't remember saying that at all at this date, do you?

The WITNESS. No, I don't recall the circumstances of it.

Mr. ADAMS. So that you can't say, from reading 322, that it is in answer to anything, can you, from your present recollection, Mr. Nelson?

2524 The WITNESS. Not to my present recollection.

Mr. ADAMS. Right. And that brings me back to the question that I was talking about before, which is that as far as you are concerned all you are actually doing in your effort to help here is guessing, isn't that true?



The WITNESS. Well, I am trying to state what I think is the situation, and there is the situation here where, in order to state it, there must be some assumptions made.

Mr. ADAMS. Exactly. Now, Mr. Nelson, your memorandum, Exhibit 322, as far as you are concerned; could have been in answer to any other memorandum supplied to you in the organization, could it not, and not necessarily in answer to this one that is before you, Exhibit 212?

The WITNESS. It might have been.

Mr. ADAMS. And as far as you are concerned, you can't tell us whether 322 is in answer to 212, or whether it is in answer to some entirely different memorandum that is not before you at all, isn't that correct?

The WITNESS. I can't testify absolutely that it is in answer to Exhibit 212.

Mr. ADAMS. And therefore, anything that you say about it, to get back to my original point, is an expression on your part of a mere speculation, isn't that correct?

The WITNESS. Well, it probably is that.

Mr. ADAMS. I respectfully object, your Honor, to 2525 the introduction in evidence of this memorandum. It seems quite clear that it has not been even circumstantially related. Kobject to Exhibit 212, not to Exhibit 322.

If your Honor pleases, there is one point I forgot to mention in making this objection, and that is that I am very much impressed here by the fact that Mr. George Brown was on the stand this morning and he could not identify it as being his, or as knowing anything about it, and if it is admitted in evidence now, we are in the strange position of having one witness called in the morning who cannot positively identify a document, and another witness called, and through a fabric of circumstances permitted to put in that same exhibit, and attribute it to the man who said he couldn't identify it, and whom we therefore could not cross-examine about it.

Justice STEPHENS. Well, we think you are mistaken, Mr. Adams, about that. We are not in the process of having one witness say that another witness' failure to identify was a mistake, or of having one witness attribute a memorandum to another. We are in the process of circumstantial identification. We think that even laying aside the testimony of Mr. Nelson, that there is circumstantial identification in the record now of Exhibit 212, because it is conceded that both of these exhibits are taken

out of the files of Certain-teed, and one of them is positively identified by Mr. Nelson.

I misspoke myself in one respect. I don't mean  
2526 without reference to the testimony of Mr. Nelson  
with respect to Exhibit 322, but without reference  
to the testimony of Mr. Nelson on the subject of the relation of the one to the other.

Without reference to the testimony of Mr. Nelson on the relation of these two exhibits to each other, we think that 212 is circumstantially identified because it bears the date March 1st, it is on the same subject-matter as 322; Exhibit 322 says, "Answering yours of March 1st"; the titles of the two are the same; and it seems to us that probably without the testimony of the witness which you characterize as speculation, as to the relationship of the two exhibits to each other, that there is circumstantial identification within the rules we have been trying to follow with reasonable equality and accuracy heretofore.

But it seems to us that this witness' testimony is not mere speculation. He has been led into using that word once, but he denied it on another occasion. I think a fair construction of this witness' testimony is that he is saying that as an officer of the company, having dealt with this subject-matter and with this type of memoranda, the circumstances and the nature of the memoranda are such that it is probable that the two exhibits are connected, and that they relate to each other.

I do not understand it to be the rule that a witness  
cannot testify as to the probability of two papers  
2527 being related to each other when he is in a position  
to know what the probabilities are.

We will admit Exhibits 322 and 212, and the record will show your objection.

Mr. ADAMS. Will the Court satisfy a curiosity of mine? Is this Exhibit 212 now in evidence as a memorandum of George M. Brown?

I call your attention in that respect to the fact that the memorandum of March 2, 1928, of Mr. Nelson's, is not addressed to anybody.

Justice STEPHENS. It is in evidence as a memorandum to which Exhibit 322 is an answer, and it is a memorandum found in the files of the Certain-teed Products Corporation. What weight is to be attached to it, we do not say at the moment.

Mr. ADAMS. It wasn't solely curiosity, because I am frankly perplexed as to what the situation is as to George

M. Brown, whether we are to regard that as something that he produced, or not, or how the Court regards it.

Justice STEPHENS. I don't know how to say any more than I have, Mr. Adams.

Mr. ADAMS. It is a difficult question.

Mr. OLIVER. May we have the usual reservation?

Justice STEPHENS. Yes. These exhibits are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

2528 (The documents marked as Government's Exhibits Nos. 212 and 322 were received in evidence.)

Mr. KNUFF. I have no further direct examination.

Justice GARRETT. The first in this set of three exhibits, you did not offer?

Mr. KNUFF. That is right, we didn't even identify it.

(Discussion off the record.)

2529 Justice STEPHENS. We will proceed, gentlemen.

What do you say, Mr. Knuff, to Mr. Adams' last objection which he put in the form of satisfaction of curiosity, but which I assume was an objection to the introduction of the exhibit, that it hasn't been attached to any particular person who might be able to bind the company?

Mr. KNUFF. I cannot refer definitely to the volume or the page of the testimony, but I think it has been identified by numerous witnesses that on the right-hand side of the paper always appears the writer of the memorandum, and on the left-hand side, if it is addressed to a particular person. I think that appears throughout in quite a number of cases, that the writer's name always appears at the top of the page. Sometimes they were signed and sometimes they were not. That was the custom with Certain-teed, sometimes they signed their memoranda, and sometimes they didn't sign them. We got it from Certain-teed's files; it was under subpoena; it is what they furnished us. They felt that it had some value, or they wouldn't have kept it in their files.

George M. Brown was president of Certain-teed at one time or another, and it appears to have been written by Mr. George M. Brown. Of course Mr. Brown is 77 years of age, and your Honors recognized of course that his memory was failing, and I think it was failing.

Mr. ADAMS. If the Court please—

2530 Justice STEPHENS (interposing). It seems to me, Mr. Adams, as a matter of circumstantial probability, that where the original of a memorandum, found in the files of a company, without any apparent irregularity upon its

face, is related by date and subject-matter and title to another identified memorandum, and bears the name of what purports to be the president of the company, a man whom the other testimony shows was the president of the company, that the likelihood of its being a forgery or a trumped-up paper is extremely remote.

Mr. ADAMS. Well, may I say this your Honor, first in an answer to Mr. Knuff's statement, I have a clear recollection that Mr. C. O. Brown testified that with respect to memoranda it wasn't in the form such as he just suggested. It is also quite significant that the memorandum is not in the usual form——

Justice STEPHENS (interposing). Not what?

Mr. ADAMS. Not in the usual form. We have any number of exhibits in this case, in the usual form, which I will indicate, as for example Exhibit 247, which happens to be a copy of one, and also Exhibit No. 248.

Justice STEPHENS. Well, we will take our afternoon recess at this time.

Announce a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Do you wish to say anything 2531 more, either of you two gentlemen? If not, we are ready to make a ruling on this.

Mr. ADAMS. I would like to call your Honor's attention to Exhibit 313. That is a typical memorandum of the company.

Justice STEPHENS. We are familiar with those forms.

Mr. ADAMS. And I also want to call your attention to my recollection of Mr. Whittemore's testimony, that it was the custom in the company to put initials on, and to scratch them off, neither of which appears on either of these memoranda.

Lastly, and I think the most important difficulty that I have, is our being placed in a position of being unable to have any cross-examination of George M. Brown with respect to a document which apparently is now attributed to him and which, if I understand the Court's ruling correctly, is to be taken by the Court as having been written by George M. Brown.

Justice STEPHENS. Well, that may be an unfortunate situation, but it isn't one which is always preventable. Suppose a witness should lose his memory completely, or should die, but another person could properly qualify a document



as having been written by him. You still could not cross-examine the author.

Mr. ADAMS. That may be true, your Honor, but that is not the situation here.

Justice STEPHENS. What I am trying to say is that it doesn't seem to us that the fact Mr. George M. Brown cannot remember that he wrote this document, necessarily forbids the Government from putting it in as his document, if it can otherwise prove it was his. Your contention is that it has not been proved, of course, but if the Government can prove that it was his document the fact that he can't remember it, and that you therefore cannot cross-examine him as to why he wrote it, would not seem to us to forbid the Government from putting it in.

Mr. ADAMS. I think we are being deprived here, since Mr. Brown was here, of what seems to me to be a substantial right with respect to cross-examination, which I agree falls in an entirely different category from the question of identification. Of course I am seriously troubled about this kind of identification. He says that it might have been in answer to a memorandum of any number of people in the company, and we happen to pick out one.

Justice STEPHENS. Judge Jackson and myself are of the view—or we are all three of the view—that it is properly admissible in evidence. The identification is not weighty, and yet we cannot say that it is so slight that we can disregard it. We think it is admissible in evidence as binding against the company, because it was found in the company's files. If the company keeps a memorandum in its files which contains subject-matter of this sort, it is some evidence that the company has knowledge of it, and that it has some bearing upon the company's affairs. Judge

2533 Garrett is not disposed to go beyond that. He is doubtful whether or not it can be said to be identified as a memorandum of George M. Brown. Judge Jackson and myself think that it is identified circumstantially as a memorandum of George M. Brown.

That being the majority view, it will be admitted in evidence for that purpose. We make no comment as to what weight we think is attachable to it.

Mr. OLIVER. On behalf of Celotex I want to object to it as to its relevancy, and I don't think it has been properly identified as far as the other defendants are concerned.

Justice STEPHENS. Well, as to relevancy, no question has ever been raised yet on that subject. We think it is

relevant, it has to do with the negotiations which led up to these license agreements. Again we say nothing as to its weight.

Justice JACKSON. The exhibits seem to me not to be of very great importance anyhow. I don't see much in them one way or the other.

Justice STEPHENS. The objections are overruled. Of course as to your client Exhibit 212 is received subject to the usual reservation with respect to declarations of alleged co-conspirators, Mr. Oliver.

Mr. JOHNSTON. I assume that applies to all the defendants?

Justice STEPHENS. That applies to all the defendants, yes. Both of these exhibits are received subject to the usual reservation with respect to declarations of alleged  
2534 co-conspirators.

(Government's Exhibits 212 and 322 previously received in evidence at page 2824 of this transcript.)

Justice STEPHENS. Do you wish to cross-examine, Mr. Bromley?

Mr. BROMLEY. Yes, your Honor.

#### CROSS-EXAMINATION

By Mr. BROMLEY.

Q. As treasurer of Certain-teed, your duties did not involve any contracts with other gypsum board manufacturers at all, did they?

A. No, sir.

Q. And you never discussed the matter of taking a license from USG with any other company, or the representative of any other company?

A. No, sir, I don't think so.

Q. As treasurer, you had ultimate supervision of the Legal Department of your company, did you not?

A. Yes, but it was approved by Mr. Brown, as president, in case of important matters.

Q. Perhaps I should not have said "ultimate", but that you had direct supervision over the Legal Department, subject to the orders and directions of your president, is that right?

A. Yes, sir.

2535 Q. And for that reason, Mr. Nelson, you considered questions with respect to settling litigation and taking patent licenses as they came up for determination by the company, did you not?

A. Yes, to some extent.

Q. Your memorandum of March 2, 1928, now Exhibit 322, was intended, was it not, to represent your view that it was advisable for Certain-teed to assume and become bound by the outstanding Beaver license?

A. Yes, sir.

Q. And there was a division within the company as to whether Certain-teed upon its purchase of the Beaver assets should assume the liabilities under the Beaver license, or should not?

A. Yes, in the early stages.

Q. And you felt that it was advisable to settle the claim which USG had asserted against Certain-teed, to assume the Beaver license, and for Certain-teed itself to take a license, did you not?

A. Yes, sir.

Q. And that was the view which was ultimately decided upon by Mr. Brown as the president of the company, was it not?

A. Yes, sir.

Q. Now in addition to the statement of some of the reasons for your view as contained in Exhibit 322, there were many other reasons why you believed it advisable 2536 for Certain-teed to take a license for all its operations, were there not?

A. Yes.

Q. And isn't it a fact that in your view it was clear that this closed-edge board was a better and cheaper product for the company to make?

A. Yes, sir.

Q. And had you satisfied yourself as to whether or not there existed a strong demand in the trade for it?

A. Well, I had talked to our sales managers as they came into the office, and the subject was generally discussed, and all of our sales people were in favor of the closed-edge board.

Q. And after talking with them and hearing what they had to say, did you conclude that that was an important reason in support of your view that Certain-teed should take a license?

A. Yes, sir.

Q. Now, did you also give consideration to the question of the expense of the litigation which would fall upon the company in the event the decision to fight should be adopted?

A. Yes, sir.

Q. And did you think that expense should be avoided by settlement?

A. Yes, sir.

Q. And did you give consideration to the fact that if you fought and defended the litigation, you might ultimately be held in a large amount of damages?

2537 A. Yes, sir.

Q. And did you think it advisable for the company to take a license in order to get out of the damage claim as cheaply as possible?

A. Yes, sir.

Q. Do you now recall that Mr. Brown finally settled the damage claim which was asserted by USG in its suit, at a figure somewhere around \$64,000?

A. I don't recall the sum, but I recall the payment of some amount that we thought at the time was fairly reasonable, in settlement of the litigation, and in connection with taking out this license.

Q. And did you also consider the fact that under the proposed license which you were asked by USG to take at this time, or offered by USG at this time, while the royalty provisions and the licensing provisions ran until 1937, the price-fixing provisions ran only until August, 1929, and that therefore price fixing under that license was to last only for a short period of time?

A. I don't recall those details, but I believe that is a correct statement.

Q. And do you recall, as was testified to by Mr. Brown this morning, that he had decided before he went to Chicago in May, 1929, that the company would take out a license?

2538 A. I can't testify specifically as to that, but I know that after various conferences in that period, we all came to the conclusion, eventually, that it was the best thing for our company to take out this license.

Q. And did you conclude in that connection that it didn't make any difference to your company what other companies did in the premises?

A. None at all.

Q. Now did you at any time in your discussions with officers and representatives of your company, ever hear of any agreement or understanding as to what USG would do about board prices after you took your proposed license?

A. No, sir.

Q. Did you ever hear of any commitment on the part of USG that it would raise prices?

A. No, sir.



Q. And were you ever informed, or did you ever hear, Mr. Nelson, that any understanding had been had as between anybody, with respect to plaster prices, or the prices of other gypsum products, such as Keene's Cement, tile and block?

Mr. KNUFF. Just a moment, please. The question is objected to as not proper cross-examination.

Justice STEPHENS. We will hear you on that, Mr. Bromley. We have some question as to whether that topic, with respect to plaster and Keene's Cement, and the like, was gone into on direct examination, either by inference 2539 or otherwise. What do you say as to that?

Mr. BROMLEY. I am afraid it is not proper.

Justice STEPHENS. I think that is correct. Sustained.

By Mr. BROMLEY.

Q. Let me ask you, Mr. Nelson, did you ever hear of any agreement or understanding in connection with the May 22, 1929, license, that the price control provided for therein should extend to unpatented articles, such as plaster or Keene's Cement or tile or block?

A. No, sir.

Mr. KNUFF. Just a moment, may I have the same objection?

Mr. BROMLEY. I think that is a good question, probably, because he did go into the May, 1929, license, and the charge in the complaint is that that license was hooked up with a sub rosa understanding to extend it to include unpatented articles.

Mr. KNUFF. I don't believe I went into the May, 1929, license, I haven't any recollection of it, your Honor.

Mr. BROMLEY. That is what all these memoranda are about, as to whether they would take that license.

Mr. KNUFF. The memoranda are about that, yes.

Justice STEPHENS. If the memoranda are about that, then the question is proper. If a witness identifies and accredits a memorandum, he may be cross-examined upon it. The objection is overruled.

By Mr. BROMLEY.

Q. Let me ask you the same question with respect to open-edge board. Did you ever hear of any under- 2540 standing or agreement made or entered into by anyone in connection with the May 22, 1929, license, that price control would extend to unpatented open-edge board?

A. No, sir.

Mr. KNUFF. The same objection, your Honor.  
Justice STEPHENS. Overruled.

By Mr. BROMLEY.

Q. You stated on direct examination, as I understood you, that Certain-teed Products Corporation during the course of your inter-company discussions preceding the May, 1929, license, was opposed to the fixing of prices on open-edge board. Was that a mistake, or did you mean to say that?

A. I believe that that was a mistake. I was under the impression at one moment here that the memorandum of C. O. Brown had had something to do with the setting of prices on open-edge board. If that was the situation, Mr. C. O. Brown was mistaken in his thought at the time that there was any question of prices that were to be fixed on open-edge board.

Q. As I recollect it, at the time, counsel was examining you about Mr. C. O. Brown's position of opposition to having the royalties fixed on open-edged board, and I wonder whether, in your testimony that Certain-teed was opposed to fixing of prices on open-edge board, you didn't mean that Certain-teed was opposed at that time to the payment of royalties on open-edge board.

2541 A. I should like to correct my testimony to show that the subject was on the payment of royalties.

Q. And not on the fixing of prices?

A. And not on the fixing of prices, I misunderstood that.

Q. The fact is, Mr. Nelson, is it not, that USG at no time made any proposal that it would or had the right to fix the prices of unpatented, open-edge board?

Mr. KNUFF. Just a second, please. The question is objected to as certainly not proper cross-examination.

Justice STEPHENS. I think that that objection is not well taken, Mr. Knuff. It goes to clearing up a doubt that was raised by the direct examination, or a statement made on the direct examination, on this subject of price fixing. I think that is proper. Overruled.

The WITNESS. May I have the question?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. No.

By Mr. BROMLEY.

Q. When you said "no", you meant that USG never asserted that it had the right to fix prices on unpatented, open-edge board, and never did fix them?

A. That is correct.

Q. You testified on direct examination that it was your position that Certain-teed should not pay royalties  
2542 on the basis of all board manufactured, which would include open-edge board?

A. Yes.

Q. Now, isn't it a fact, Mr. Nelson, that your position was that you desired that Certain-teed negotiate a license at as low a royalty as possible?

A. Yes.

Q. And you knew that if the royalty basis included all board manufactured, that that would result in a higher annual royalty payable by Certain-teed to USG?

A. Yes.

Q. And you therefore wanted to cut down the amount by limiting the basis merely to the closed-edge board, isn't that right?

A. Yes.

Q. You knew, however, did you not, that it was USG's position that since there were so many patents involved, there probably would be disputes over the years as to whether any particular board, whether it be open-edge or not, was covered by some patent, and as a result its offer was that the royalty basis should include all board manufactured by your company, no matter of what kind or type?

A. Well, I didn't know just what the policy of the USG might be, as I didn't have any direct contacts with them.

But neither did we know at that time whether we  
2543 would manufacture or try to make open-edge board along with the closed edge. These memoranda represented an exchange of views during a period when none of us had made up a final policy, so that eventually when it was settled that we would make only the closed-edge board under the license, the subject of a royalty or anything else on the closed-edge board disappeared.

Q. On the open-edge, you mean.

A. Yes, on the open-edge, that is what I mean.

Justice STEPHENS. If you have a number of other questions, the Court regrets that it will have to adjourn because there is a meeting of the Patent Interchange Committee this afternoon which I have to attend, which will require my discontinuing now. If you are within a moment or so of the end of your examination, we will continue for the convenience of the witness, but if you are likely to take as much as five minutes, I am sorry but I will have to leave.

Mr. BROMLEY. In view of the fact that the witness has to leave, I will ask one or two more questions within the five minutes, if your Honor will permit me.

Justice STEPHENS. I don't want to unduly restrict you in your examination. You are entitled to complete your examination and hold the witness over, if necessary.

Mr. BROMLEY. I think I can do it in a couple of more questions.

Justice STEPHENS. Very well.

2544 By Mr. BROMLEY.

Q. You understood there was nothing in the license as proposed by USG which would prevent you from making open-edge board, did you not?

A. That is right.

Q. And the company's decision to make closed-edge board was arrived at as a business proposition, was it not, because the company thought it was a superior product.

A. Yes.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any other cross-examination? (No response.)

Justice STEPHENS. Is there any redirect examination?

Mr. STEFFEN. I have about one question, your Honor.

Justice STEPHENS. Very well.

#### REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. You stated that you thought the settlement with USG of \$64,000 was reasonable, is that correct?

A. Yes, I think it was.

Q. Do you know what the probable or possible liability was under the USG suit?

A. No, sir, I don't know offhand.

Q. Then why did you say that this settlement was reasonable?

2545 A. We thought it was reasonable to pay that, at that time, in order to escape any possibility of future liability.

Q. George M. Brown was on a \$1,000,000 bond, was he not?

A. Yes, sir.

Q. And was the claim anywhere around \$1,000,000 or \$4,000,000 against you at that time?

A. I don't recall the amount of the claim, but it was very large.

Mr. STEFFEN. Thank you.



## RECROSS-EXAMINATION

By Mr. BROMLEY.

Q. Can you identify Warren Henley's signature on Defendants' Exhibit 15 for identification?

A. No, sir, I don't know it.

Mr. BROMLEY. That is all.

Justice STEPHENS. We will recess until tomorrow morning at ten.

(Thereupon, at 3:50 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, January 18, 1944.)

2546 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

*Washington, D. C., Tuesday, January 18, 1944.*

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances: (Same as heretofore noted.)

2547

PROCEEDINGS

Justice STEPHENS. Corrections to the record.

At page 2730—this is not a correction, but a reference to a suggested reservation on a ruling, Mr. Steffen and Mr. Knuff.

At page 2729, Mr. Bromley said: "... we have noticed elsewhere in the record that there are three Government exhibits, Nos. 145, 146 and 211, as to which the record does

not show the usual reservation at the time they were received in evidence. Exhibits 145 and 146 were received at page 1234, and Exhibit 211 was received at page 1933.

"Unless there is objection, may the record be amended so that it will appear that those exhibits were received subject to the usual reservation with respect to the declarations of alleged co-conspirators?"

"Justice STEPHENS. Is there any objection?"

"Mr. STEFFEN. We haven't checked it, Your Honor. I would like to reserve the right to object after I check them. But I think it will be all right."

"Justice STEPHENS. Suppose you check it during the day and let us know . . ."

Have you checked it?

Mr. STEFFEN. We have no objection, Your Honor.

Justice STEPHENS. Then that reservation may be indicated with respect to those three exhibits. Specifically, Government's Exhibits Nos. 145, 146, and 211 are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

2551

*Offers in evidence*

Mr. KNUFF. May it please the Court, just before the Christmas recess, on December 21, Mr. Bromley asked me to produce the originals of Defendants' Exhibits 13 to 17 for Identification.

I have made an effort to find those in our files, and we can not locate them.

At this time we offer in evidence Government's Exhibit 323, the same being the Bill of Complaint filed in the District Court of the United States for the Northern District of Illinois, the Eastern Division, in the case of *United States Gypsum Company, a Corporation, v. The Beaver Products Company, Inc., The Beaver Board Companies, and Certain-teed Products Corporation*, Equity No. 7907.

The copy of the Bill of Complaint, of which Exhibit No. 323 is a photostat, was furnished me by Mr. Bromley.

Do you have any objection, Mr. Bromley?

Justice STEPHENS. Is this the suit, Mr. Knuff, concerning which the witness George M. Brown testified? —

Mr. KNUFF (interposing). Yes, sir, it is, Your Honor.

Justice STEPHENS (continuing) — that an answer had been filed, and that the company had decided to contest the case?

Mr. KNUFF. Yes, it is, Your Honor.

Mr. BROMLEY. May it please the Court, we have no objection except the usual objection, but, desire to  
2552 point out that there was an amended complaint, which I also furnished to the Government:

Mr. KNUFF. I haven't any objection to putting it in. I didn't think it was material. If the defendants want it in, I will be glad to have it photostated and put it in.

Justice STEPHENS. What is the purpose of the offer? What do you offer it to prove?

Mr. KNUFF. Well, this is just one of a series, and I think that if the Court will bear with me until I get the rest of it in, it will be quite apparent.

Mr. BROMLEY. I had some doubt as to its materiality, but since both of us had asked questions of witnesses about the suit, it seemed to me probable that it was proper for the Government to put in the complaint, although I don't think there is anything in the complaint that has any materiality in addition to what has already been brought out,—that there was a suit.

Justice STEPHENS. It may be received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. FINCK. May the record show that National and Baker object to this being introduced in evidence and accepted by the Court, on the ground that it is incompetent, irrelevant and immaterial, and is not binding on Baker and National Gypsum Company.

2553 Justice STEPHENS. Do you raise any different question by that objection than you have usually raised with respect to the declarations of alleged co-conspirators?

Mr. FINCK. I don't know, I haven't seen the document. I would like to have the record show that.

Justice STEPHENS. Well, it will be received over that objection. It seems to the Court that the reservation protects you. Unless a conspiracy is shown, it would not be binding upon the persons who were not parties to the agreement. Of course, the rule is, as I understand it, that once a conspiracy is shown, the declarations and acts of one co-conspirator are binding upon the others.

Mr. FINCK. If Your Honor please, I don't know that this is an act or admission or what it is, and it is a very large, voluminous document, and I haven't time to read it at the moment.

Justice JACKSON. Did the amended complaint supersede this complaint, Mr. Bromley?

Mr. BROMLEY. Yes.

Justice JACKSON. Then that was really the complaint in the action, was it not?

Mr. BROMLEY. Oh, yes.

Mr. KNUFF. We haven't any objection to putting in the amended complaint, and I will have it photostated and put it in.

2554 Justice STEPHENS. This may be received subject to the reservations indicated.

(The document referred to, marked as Government's Exhibit 323, was received in evidence.)

Mr. KNUFF. I also offer in evidence, if Your Honor pleases, Government's Exhibit 324, the same being the Answer of the defendant Certain-teed Products Corporation to the Bill of Complaint. This was the answer filed to the original complaint. The amended complaint, as I say, I will have photostated and filed.

Justice STEPHENS. If you wish, Mr. Finck, to take time to read these documents, you may have leave to make such additional objection as you feel you should make after you have read them.

Mr. FINCK. Well, if I may reserve that right, I would like to very much, and I will read them tonight.

Justice STEPHENS. And the same applies to the other defendants' counsel.

Justice JACKSON. Is this the answer to the complaint as amended?

Mr. KNUFF. No, to the original complaint.

Justice JACKSON. Is there another answer?

Mr. KNUFF. No, this is the only answer of Certain-teed, I believe. I am not sure as to that.

2555 Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 324, was received in evidence.)

Mr. KNUFF. Now in connection with the answer, I respectfully call the Court's attention—

Mr. BROMLEY (interposing). Just a moment, please, Mr. Knuff.

May it please Your Honor, may I have the record show that we object to the proffer of the answer not only on the ground which Your Honor has indicated, that is, the usual objection, but also on the ground that the answer is not material or relevant or competent because not in furtherance of the conspiracy charged in the complaint; and we also object to it as incompetent as against all defendants



other than Certain-teed on the ground that the statements contained therein are not binding on any of the other defendants.

Justice STEPHENS. What do you say to the objection that it is not in furtherance of the conspiracy?

Mr. KNUFF. I think as soon as I call Your Honors' attention to the paragraphs that I am going to call Your Honors' attention to, that it will be quite apparent.

Justice STEPHENS. Will you please do that, then,  
2556 because the Court doesn't like to rule in the dark on the question raised.

Mr. KNUFF. We direct Your Honors' attention particularly to paragraphs 26, 27, 28, and the remaining paragraphs of the answer; and with reference to paragraph 27 of Certain-teed's answer, particularly that portion of the paragraph which states that the license agreements were entered into not for the purpose of securing royalties, but for the purpose of enabling the United States Gypsum Company to dominate the gypsum board industry, to control prices of said board, and to restrain trade in violation of the Anti-Trust Act.

We likewise direct Your Honors' attention to the fact that in this paragraph, Certain-teed said, "The purpose of United States Gypsum Company"——

Mr. BROMLEY (interposing). I object to stating the contents of a document not yet in the record, so fully.

Mr. KNUFF. I thought it was in evidence, Your Honor.

Justice STEPHENS. It isn't in evidence, Mr. Knuff, because, although I did receive it, I received it upon the assumption that there was no further objection to be made, and counsel did make an additional objection which they have a right to be heard on.

At the same time, Mr. Bromley, I don't see how the Court can rule on the materiality of it unless it hears about it.

2557 So make your statement, Mr. Knuff. If we don't receive it, this matter can go out.

Mr. KNUFF. With further reference to paragraph 27, we direct Your Honors' attention to the fact that in this paragraph Certain-teed said that the purpose of USG to restrain trade is shown by the fact that the royalty was to be paid not only on patented board but also on unpatented board. This was done, according to paragraph 27, for the purpose and with the intent of restraining trade by, in effect, preventing Certain-teed from manufacturing or selling open-edge board and eliminating competition between open-edge board and closed-edge board.

I also direct Your Honors' attention to the fact that this complaint is signed by Certain-teed Products Corporation—

Justice JACKSON (interposing). This answer, you mean?

Mr. KNUFF. Yes, this answer is signed by Certain-teed Products Corporation, by the firm of Cravath, Henderson and DeGersdorff.

Justice STEPHENS. Are there any other objections?

Mr. ADAMS. May I object on behalf of Certain-teed, on the ground that this is neither relevant nor material, and has no probative value in showing that Certain-teed was in any way connected with any conspiracy. It seems to me that

2558 it does not constitute in any sense, so far as Certain-teed is concerned, an act or declaration which could be deemed to be that of a conspirator. It does not connect Certain-teed with any conspiracy, and it certainly can not be in any sense construed, as far as Certain-teed is concerned, as an admission. Therefore, I can't see that it can be in any way binding upon Certain-teed as proving that Certain-teed was a party to any conspiracy. It is a mere assertion in a pleading which, as the Court knows, from the history of the litigation which is before it, was never tried.

Mr. BROMLEY. It seems to me the reason that this is not admissible is not only that it is a mere statement in an unsworn pleading, and not only that there was never any adjudication as to the validity of the defense, but certainly such a statement as this could not be binding upon the plaintiff to the suit, for instance, unless it could be considered to be a declaration of a co-conspirator.

Now the general rule about the declaration of a co-conspirator is that acts and declarations of one, in furtherance of a common purpose, are admissible as to all other alleged co-conspirators. The declaration must be one which is designed to, and which does, promote the common purpose. It seems to me that by no stretch of the imagination could this statement by Certain-teed, made as it was in the course of a contested lawsuit, be held to be a declaration

2559 for the purpose of promoting or with the effect of promoting any common purpose or any conspiracy.

Therefore, I think on that ground it is immaterial and irrelevant.

Justice STEPHENS. What is your position in response to those objections, Mr. Knuff?

Mr. KNUFF. In 1928, USG instituted this suit against Beaver and against Certain-teed Products Corporation.

At that time Certain-teed filed an answer in which they set-up the matters alleged in the defense. That was filed on the 14th of March, 1928.

On the 22nd day of May, 1929, in spite of what Certain-teed had said a year and two months previous as to the purpose of these license agreements, Certain-teed entered into a licensing arrangement similar to the one that they were contesting in 1928. Certainly it is an admission as to Certain-teed, and it is also a declaration in furtherance of the conspiracy.

Mr. ADAMS. May I say, Your Honor, with respect to Certain-teed, that that seems to me—the statement that we should be charged with having made a declaration here because a year and two months later we entered into a license—to amount to almost a perfect non sequitur. There may have been, and undoubtedly were—as I think the record clearly shows—many, many other reasons why Certain-teed entered into this license, and it also seems clear

to me that Certain-teed may and undoubtedly did enter into the license agreement because the facts which it had originally asserted in its answer, it developed, it was unable to prove, and that they were not true.

Justice STEPHENS. Isn't that a matter of defense, in explanation?

Mr. ADAMS. No, on the record as it stands here. Moreover the logic of the Government's position doesn't seem to me to be clear, because they say, "First you say one thing in an answer; a year and two months later you settle a lawsuit; therefore, when you made that statement in your answer, you must have been acting as a conspirator."

It doesn't seem to me to follow, and it doesn't seem to me that it should be binding on Certain-teed for that reason.

Justice STEPHENS. What is your contention as to how it furthered the conspiracy? I understand your contention as to admission, but I don't quite understand your contention with respect to furtherance.

Mr. KNUFF. A year and two months later they entered into almost an identical contract, after stating that the purpose of this contract was in restraint of trade.

Justice STEPHENS. How would that promote the conspiracy? How would their statements in this answer promote the conspiracy?

Mr. KNUFF. Their actions promoted the conspiracy in 1929.

2561 Justice STEPHENS. But you are not introducing their actions. You are introducing their utterances;

and the objection is that this utterance didn't further the conspiracy.

Mr. KNUFF. It characterizes the whole conspiracy.

Justice STEPHENS. Now you are talking in terms of an admission.

Mr. KNUFF. No, I am talking in terms of a declaration, if Your Honor please.

Justice STEPHENS. Perhaps the Court doesn't make its question clear to counsel, but counsel doesn't seem to me to be discussing anything but the answer in terms of an admission. What counsel are objecting specifically to, on the defendants' side, is that it doesn't show any furtherance of the conspiracy, and therefore isn't evidence as a declaration, it isn't admissible as a declaration.

Mr. KNUFF. You will recall yesterday that George Brown was on the witness stand, and in his testimony he said he had talked with Mr. Avery, and that he later had talked with his attorneys and told them to file an answer. And this is the answer that George Brown apparently told his attorneys to file, and this is the answer that they did file, and in this answer they made certain declarations concerning the purpose of the license agreement. And we say that they are declarations in furtherance of that conspiracy.

2562 Justice STEPHENS. Well, I realize, Mr. Knuff, that that is what you say, but the doubt I have in my mind is that I don't yet see the logical nexus.

What did these utterances do which aided the conspiracy?

Mr. KNUFF. Get the whole picture, Your Honor. In 1926 Beaver entered into a license agreement with USG. In 1927 Atlantic and Texas and Universal entered into a similar agreement. Now at that time the conspiracy was formed, in 1927, it had body, it had substance.

In 1928 these defendants filed this answer, and in that answer they make certain statements that relate to the conspiracy that was already in existence.

Now, on the 3rd day of April, 1929, they settle this litigation—I beg your pardon, on the 22nd day of May, 1929, they settle this litigation, and enter into an identical licensing arrangement.

Now their conduct in settling this litigation, plus what they said in their answer, seems to me to be a clear-cut declaration of one co-conspirator against the other.

Justice STEPHENS. Well, the Court hasn't asked you to discuss that. The Court hasn't asked you to discuss whether it constitutes an admission. I think we are all agreed that



it may be regarded as in the nature of an admission. The only question I have in my mind—it may not exist  
 2563 in the minds of my colleagues—is whether it can be said to have been done in furtherance of the conspiracy.

Mr. KNUFF. I have two other exhibits. One is the paper of settlement, or the stipulation of settlement; and the other is the order of the Court that was entered on the 22nd day of May. Those two, in connection with what they said, seem to me to be certainly a declaration of one conspirator in furtherance of the conspiracy. They haven't been offered yet or identified.

Justice STEPHENS. I think, Mr. Bromley, that the rule is not quite as limited as you stated it. I think declarations of co-conspirators made either in furtherance or in execution of the conspiracy are admissible in evidence.

Mr. BROMLEY. I think that is so. On the other hand, a statement which is a mere narrative, and which serves no purpose toward either executing the combination or furthering its purpose, I believe has been uniformly ruled out. The most extreme example that I can think of, which has often been before the Courts, is where one co-conspirator, during the pendency of a conspiracy when it is first being investigated, is hauled up before the District Attorney and he makes some admissions about the nature or scope of the conspiracy, and then it is sought in the subsequent trial to introduce those as binding on his alleged co-conspirators. And the Courts say, "Well, that is an  
 2564 admission by that one man"; but certainly the principle of agency which lies behind the rule of admitting declarations of co-conspirators was never extended so far as to let anybody assume that parties to a conspiracy authorized one of their members to go in and confess before the District Attorney. That didn't further the conspiracy. That wasn't part of the scheme either in executing it or in furthering its purpose. And that is the first analogy that occurs in my mind.

Certainly here, for one of the parties to make a narrative statement about his views as to the Beaver license, executed some years before the answer was filed, could not possibly be said to have furthered the purpose of USG and the others, if they had one, to enter into an illegal conspiracy. If anything, of course, it is against, contrary to, the alleged purpose of the conspiracy.

Justice STEPHENS. We will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2565. Justice STEPHENS. The Court is agreed—

Mr. ADAMS (interposing). May I, Your Honor, add one further ground of objection?

Justice STEPHENS. Yes.

Mr. ADAMS. That is, that the admission contained in the pleading, if it be argued that it is an admission, can only be deemed to be an admission for the purpose of that litigation, and cannot be regarded as an admission in any other litigation except possibly between the same parties, covering the same subject-matter.

Justice STEPHENS. Read his statement, please. I didn't get all of it.

(Thereupon, the statement by Mr. Adams was read by the reporter.)

Justice STEPHENS. The Court is agreed that Exhibit 324 is admissible in evidence as an admission of Certain-teed, binding upon Certain-teed, for whatever weight it may be entitled to. It seems to the Court that in view of the nature of the statements in the answer, and the added fact that later Certain-teed did take a license, that it may be said to constitute an admission. But the Court is also agreed that it cannot, at least in the present state of the record, be admitted as binding upon the other defendants as a declaration either in furtherance of, or in execution of a conspiracy. It would seem to the Court that, if anything,

2566 it would be contrary to the furtherance or execution of the conspiracy. It may be that the exhibit, when connected with other evidence, will be entitled to some probative value, will display some probative value, in showing the history of the building up of the alleged conspiracy, and the Court will consider it for that purpose if, in connection with other evidence, it appears to have relevance and probative value for such a purpose.

(Government's Exhibit No. 324 previously received in evidence at page 2851.)

Mr. KNUFF. I wonder if I passed up to your Honors four copies of the bill of complaint and four copies of the answer, and four copies of the other exhibits that I am going to introduce. I brought over sufficient copies but apparently I do not have a copy for the record.

Justice STEPHENS. We each have only one copy of the answer, one copy of the complaint, and one copy of an order. Then we have four little pamphlets, and that is all.

Mr. KNUFF. If your Honor please, I offer in evidence Government's Exhibit 325, the same being an order of the

Court, dated April 2, 1928, in the case of United States Gypsum Company v. Beaver Products Company, et al., directing the defendant Certain-teed Products Corporation to post a bond in the sum of \$1,000,000.

Justice STEPHENS. Is there any objection?

2567 Mr. BROMLEY. Only the usual objection, if the Court please.

Mr. FINCK. On behalf of National and Baker, I would like to make the same objection as to immateriality and irrelevancy of this document.

Mr. OLIVER. May we have the same objection for the other defendants?

Justice STEPHENS. Yes, the objection of all defendants may be shown as to relevancy and materiality, and the exhibit is received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

It seems to the Court that it is admissible in evidence at least as illustrative of the testimony which has already been produced through witnesses as to the fixing of a bond and the reason for the bond, and the reason for the settlement, and the like.

(The document marked as Government's Exhibit No. 325 was received in evidence.)

Mr. KNUFF: I also offer in evidence Government's Exhibit 326, the same being a stipulation entered into by Scott, Bancroft, Martin and MacLeish, and Winston, Strawn and Shaw, attorneys, in the case of United States Gypsum Company v. Beaver Products Company, Inc., et al.

Justice STEPHENS. Is there any objection to this?

Mr. FINCK. The same objection, your Honor.

2568 Justice STEPHENS. This is received in evidence over the objection of the several defendants, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 326 was received in evidence.)

Mr. KNUFF: I also offer in evidence Government's Exhibit 327, the same being the order of the Court dated May —, 1929, in the case of United States Gypsum Company v. Beaver Products Company, Inc., et al.

Justice STEPHENS. It may be admitted in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators, and over the objection of the several defendants.

(The document marked as Government's Exhibit No. 327 was received in evidence.)

Mr. KNUFF. I offer in evidence Government's Exhibits 328 to 332, inclusive, the same being the annual reports of the United States Gypsum Company for the years ending December 31, 1925—

Justice STEPHENS (interposing). What number will that be?

Mr. KNUFF. Government's Exhibit 328.

Justice JACKSON. What is the date again, please?

2569 Mr. KNUFF. The report for the year ending December 31, 1925.

The next, which will be Government's Exhibit 329, is the report for the year ending December 31, 1926.

The next, Government's Exhibit 330, is the report of the United States Gypsum Company for the fiscal year ending December 31, 1927.

The next, which will be Government's Exhibit No. 331, is the annual report of the United States Gypsum Company for the year ending December 31, 1928.

The last one, which will be Government's Exhibit 332, is the annual report of the United States Gypsum Company for the year ending December 31, 1929.

In connection with Exhibit No. 332, I direct your Honors' attention to the second sentence appearing opposite the date February 13, 1930—

Justice STEPHENS (interposing). On what page?

Mr. KNUFF. The pages are unnumbered, your Honor. It is over the signature of Sewell L. Avery, and it is the second sentence from the top of that page.

Justice STEPHENS. Which page?

Mr. KNUFF. It is the right-hand page, this one (indicating).

Justice STEPHENS. How does it read?

2570 Mr. KNUFF. "The returns to be received, while substantial, are relatively of a minor amount. The major benefits anticipated are a relief from the disadvantages of and incident to legal contention, and the increased consumption of wallboard products which should follow the quality improvements that a full and uniform use of the patented methods and products should assure".

Justice STEPHENS. This purports to be Mr. Avery's report to the stockholders, is that right?

Mr. KNUFF. Yes, sir.

Justice STEPHENS. Do you offer the entire book or just the report to the stockholders?

Mr. KNUFF. I am primarily interested in Mr. Avery's report to the stockholders. However, I am offering the entire book.



Mr. BROMLEY. We object to all of the exhibits offered on the ground that they are immaterial and irrelevant.

Justice STEPHENS. Do you wish to argue it?

Mr. BROMLEY. No suggestion, as I understand counsel, has been made that there is any relevancy as to the annual reports for the years 1925, 1926, 1927 and 1928.

I don't understand on what theory they are offered. They are prior to the time of the allegation of any conspiracy, as I read the complaint, and they would seem to me on their face to disclose nothing relevant to the charges in the complaint.

2571 Justice STEPHENS. We are dealing first with Exhibit No. 332, which is the annual report for the year ending December 31, 1929. Do you contend that that statement particularly, in the report to the stockholders, to which Mr. Knuff has directed attention, is not admissible against USG as an admission?

Mr. BROMLEY. I do not understand by what possible construction that could be deemed to be an admission of anything charged in the complaint. All it amounts to is, when read in the context, that the company has suffered for many years from general infringement of its patents, that it has incurred litigation expense, that finally the litigation has been settled, and damages paid and licenses granted, and that the returns from the licenses, while substantial, are of a relatively minor amount. Well, I suppose they are as compared with the amount of income and business that this company was doing. With a balance sheet balancing at \$64,000,000 I don't see what difference it makes that the royalties which were stated in the opening—and I suppose agreed to by the Government—ran into hundreds of thousands of dollars, which is certainly a substantial sum, but a minor figure when compared to the income of the company. The major benefits are relief from litigation and the increased consumption of wallboard following the use of the patents.

I don't perceive anything that can be said to be  
2572 an admission of any charge in the complaint.

Mr. KNUFF. In the complaint, if your Honor please—

Justice STEPHENS (interposing). You need not reply, Mr. Knuff. We think the stockholders' report introduced for the purpose particularly of the sentences read into the record, is admissible in evidence as an admission or a declaration by an alleged co-conspirator. It is received, subject to the usual reservation with respect to declarations of alleged co-conspirators. We think your arguments, Mr.

Bromley, go to its weight rather than to its admissibility.

I am not quite sure, Mr. Knuff, as to why the balance of it should be considered a part of the record unless you wish to show all of this financial report as confirming the statement that the income from the licenses is minor.

Mr. KNUFF. Well, I haven't any particular desire to have the rest of it put in the record.

Justice STEPHENS. Well, the only reason the Court raises the point is that it might save record copying at some time if you simply offer that portion of the exhibit consisting of the two pages which are the purported report of Sewell L. Avery to the stockholders of United States Gypsum Company.

Mr. KNUFF. I think probably we would like to have one of these in evidence, in full, although I don't care which one it is. It shows the size and the dealings of the company, and while of course size isn't any indication that  
2573 they would be conspirators, nevertheless it helps to give substance and background to the whole case.

In so far as Exhibits 328 to 331 are concerned, the Reports to the Stockholders are the only things we are particularly interested in.

Justice JACKSON. How are they at all admissible? They are prior to 1929, aren't they?

Mr. KNUFF. Yes, but you see, this whole thing had its inception back in 1925 and the reports to the stockholders from 1925 through 1928 show the competitive situation in the industry.

Justice STEPHENS. Well, Exhibit 332 will be received in evidence in full, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Now let us have time to look at the reports to stockholders in each of the other cases.

Mr. JOHNSTON. If the Court please, I would like to inquire if that is received as an admission against these other defendants.

Justice STEPHENS. I don't know how the Court can make itself any plainer. It has ruled time and again that the declarations of co-conspirators are not binding against each other unless a conspiracy is ultimately shown, that they are binding, if a conspiracy is ultimately shown, provided they are also shown to be in furtherance of or execution of the  
2574 conspiracy; and the Court has received all of this class of testimony under the same general reservation and protection of the defendants, that it is received subject to the ultimate proof of the existence of a

conspiracy. I think this is not different from any other rulings on that subject.

Mr. JOHNSTON. I would like the record, on behalf of Texas, to show the same objection that Mr. Finck made to the previous offer. I cannot see where there is anything here in furtherance of the conspiracy as to Texas. I think it is wholly irrelevant and immaterial.

Justice GARRETT. You are speaking now with respect to Exhibit 324, are you?

Mr. JOHNSTON. Yes.

Justice STEPHENS. Well, that is the answer, isn't it?

Mr. OLIVER. Yes, Exhibit 324 was the answer.

Justice STEPHENS. Exhibit 324 was received as binding only upon Certain-teed.

Mr. OLIVER. Yes.

Justice STEPHENS. That was perfectly clearly stated.

Mr. OLIVER. And Mr. Johnston and I think that Exhibit 332 should be admitted only as binding upon United States Gypsum.

Justice STEPHENS. Well, we are now back talking about Exhibit 324. Let's get that disposed of first. I understand that Mr. Johnston is now renewing an objection to 324?

Mr. OLIVER. No, he says that Exhibit 332 should be received subject to the same limitations as were enforced with respect to Exhibit 324.

Mr. JOHNSTON. I just wanted the same order made on this one as was made on Exhibit 324.

Justice STEPHENS. I beg your pardon.

Well, we think that the objection now raised by Mr. Johnston and Mr. Oliver as to Exhibit 332 presents exactly the same question as was presented concerning 324, and that we ought therefore to rule that Exhibit 332 is admissible as an admission of United States Gypsum, for whatever weight it may be determined to have, but not as binding upon the other defendants, for the same reason that we ruled that Exhibit 324 is not binding, that is, that the statements therein are not shown to be in furtherance or in execution of the conspiracy as far as the present state of the record is concerned. It may be, as the record develops, that other evidence will give it further relevance. If so, that can be called to our attention.

Now with respect to the others, we haven't had time to examine them yet.

Mr. KNUFF. From Exhibit 328 straight through to 331, inclusive, you will find that the competitive situation in the industry is discussed in each Report to Stockholders.

In Exhibit 328 you will find that on the second page, the next to the last paragraph, about two inches up 2576 from Mr. Sewell L. Avery's name, it states, "Competition in all important branches has been increasingly severe, and prices have continued to decline".

Then in Exhibit 329, the competitive situation is dealt with on the first page of the Report to the Stockholders, in the last paragraph, "Competition has been increasingly active throughout the year, and indications point to a continuation of this condition".

Then, in Exhibit 330, also on the first page of Mr. Avery's report, the last paragraph of that page, it states, "Competition has been increasingly severe throughout the year."

Then we come to 1928, and again it is on the last page of Mr. Avery's Report to the Stockholders, where it states, "Competitive conditions have been of a severity unknown in the industry for many years."

Then when we come down to 1929

Justice STEPHENS. (interposing). Did you mean on the first page of the 1928 report?

Mr. KNUFF. Yes, your Honor.

Then when we come down to 1929 we don't find any discussion about competition, and it was in 1929 that the license agreements were entered into.

Mr. JOHNSTON. May I be heard just a second?

Justice STEPHENS. Yes.

Mr. JOHNSTON. I would like to reserve the right 2577 to interpose a formal objection to these other exhibits after we shall have had an opportunity to read them. We have never seen them.

Justice STEPHENS. You may do that.

Mr. JOHNSTON. If I can do that, then in the morning perhaps Mr. Oliver and I may want to make a further objection.

Justice STEPHENS. You may do that, you may make an objection later if you find that you want to do so, after you have read them.

Mr. FINCK. I assume that the rest of us have that privilege, too?

Justice STEPHENS. That privilege is always open to any defendant who has not had opportunity to read an exhibit at the time an exhibit is offered.

These exhibits, 332, 331, 330, 329, and 328, are received in evidence under the following ruling:

We think they are illustrative of the testimony thus far introduced; they are some evidence of the conditions in the



industry, and constitute something in the nature of an admission, for whatever weight it may have, on the part of USG competition ceased in 1929. We are still unable to see, with respect to these as with respect to the others we have just been discussing, that they are in execution or furtherance of the conspiracy, and consequently we receive them as binding only on USG, making this ruling consistent with the other rulings. But, subject to those reservations, they are received in evidence.

(The documents marked as Government's Exhibits Nos. 328 to 332, inclusive, were received in evidence.)

Mr. KNUFF. Mr. A. D. Redfield.

Whereupon, A. D. REDFIELD, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Your name, sir, is A. D. Redfield, is that correct?

A. Yes, sir.

Q. By whom are you employed, Mr. Redfield?

A. The Crosley Corporation, Cincinnati, Ohio.

Q. How long have you been employed by the Crosley Corporation?

A. About four years.

Q. What is your profession?

A. Patent lawyer.

Q. Were you previously employed by the Certain-teed Products Corporation?

A. Not directly, I was employed by Chaffee, Dawson and Shealy, a law firm who were retained by the Certain-teed Products Corporation.

2579 Q. And that was a law firm retained by the Certain-teed Products Corporation?

A. Yes, sir.

Q. And what was your connection with that firm, sir?

A. I was merely a worker in the firm.

Q. Were you a lawyer at that time?

A. Yes, handling the patent problems that that firm had, including those of Certain-teed Products Corporation, or some of those of Certain-teed Products Corporation.

Justice STEPHENS. Will you repeat that answer, please?

(Thereupon, the last answer of the witness was read by the reporter.)

Justice STEPHENS. Raise your voice just a little, please.

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. You say you did handle some of the patent problems that the Certain-teed Products Corporation had at that time?

A. Yes, sir.

Mr. KNUFF. May we have Exhibit 233, please?

Justice STEPHENS. That is one that has already been marked, but not introduced, is it not?

Mr. KNUFF. Yes, your Honor.

(Thereupon, Government's Exhibit No. 233 for identification was handed the witness.)

By Mr. KNUFF.

2580 Q. Do you recognize Exhibit 233 as being a memorandum, dated August 2, 1929—

Mr. ADAMS (interposing). I respectfully object to the witness—

Mr. KNUFF (interposing). Let me finish my question, please.

Mr. ADAMS. I am sorry, I thought you had finished.

Justice STEPHENS. Complete the question, Mr. Knuff.

By Mr. KNUFF.

Q. Do you recognize Exhibit No. 233 as being a memorandum, dated August 2, 1929, which you prepared and which was addressed to Mr. C. O. Brown, who was connected with Certain-teed?

Mr. ADAMS. May I at this time object to any testimony of this witness with respect to this matter, on the ground that it is privileged, as being a communication from a lawyer employer by a law firm under general retainer by Certain-teed, to the company?

Mr. KNUFF. So far I have just asked him to state whether he recognized that as a memorandum that he prepared.

Mr. ADAMS. I object to any testimony about it in this case, in the absence of a showing of waiver of the privilege.

Justice STEPHENS. Do you think identification of a document constitutes an invasion of the privilege?

Mr. ADAMS. I do, your Honor, particularly under  
2581 the circumstances of the testimony of this witness which was shown to me previously, as to what he testified before the grand jury. I agree, your Honor, that I may be premature in raising this question at this time. I just wanted to be sure that I raised it at the outset. It may be that I have raised it too early.

Justice STEPHENS. Is this the exhibit concerning which the question of privilege came up before?

Mr. ADAMS. That is right, your Honor.

Mr. KNUFF. Yes, sir.

Justice STEPHENS. Well, the Court understands the privilege rule not to forbid identification of a document, Mr. Adams. Now if the document is to be introduced in evidence, that is the place where the privilege arises, is it not?

Mr. ADAMS. Well, I think I am wrong about that, your Honor, I think I have raised it prematurely.

Justice STEPHENS. You may have leave to object at the proper time, but we think the objection is premature now, and that the witness may be interrogated as to whether he can identify the document.

By Mr. KNUFF.

Q. Do you identify this as a document that you prepared, sir?

A. Yes, sir.

Q. I notice on the left-hand side of the page there is some writing in small hand. Do you recognize that writing?

2582 A. Yes, sir.

Q. That is your handwriting?

A. Yes, sir.

Q. And you prepared this memorandum?

A. Yes, sir.

Mr. KNUFF. If your Honor please, we now offer in evidence Government's Exhibit 233.

Mr. ADAMS. At this point I object on the ground that on the showing before the Court—and I think the Court read the memorandum at the time it was offered previously, and probably has glanced at it this morning—it is apparent that it is a privileged communication and there is no showing that the privilege has been waived.

Justice JACKSON. Your contention, Mr. Knuff, is that the privilege has been waived?

Mr. KNUFF. Not only in the answer is there a specific waiver of the privilege, but this witness, before he testified before the grand jury on June 4, 1940, contacted Mr. Dowd, an officer of Certain-teed Corporation at that time, when he claimed the privilege, the attorney-client privilege, he contacted Mr. Dowd and Mr. Dowd told him to go ahead and identify the exhibit.

Mr. ADAMS. Well, in the first place, your Honor—

Mr. KNUFF (interposing). I had probably better bring that out by testimony, so that your Honors can rule  
2583 on it directly.

Justice STEPHENS. Mr. Adams?

Mr. ADAMS. I want to point out at the outset that the waiver was merely with respect to identification, which your Honor says is proper, and did not waive any other privilege.

Justice STEPHENS. Let's not go at this piecemeal, gentlemen. Will you refresh the recollection of the Court, first, Mr. Knuff, as to what took place before the grand jury and as to the answer you referred to? My colleague, Judge Jackson, has forgotten and I have forgotten about the admission you are talking about in an answer. You will have to show us that and refresh our recollection about these grand jury proceedings, also, as it has been several weeks since this matter previously came up. Then you will have opportunity, full opportunity, to reply, Mr. Adams; we will have full discussion on the subject.

Mr. KNUFF. The answer, as I recall it, is Certain-teed's answer, paragraph 119.

Justice STEPHENS. In this case?

Mr. KNUFF. In this case, your Honor. I may be wrong on that, but it is my recollection that it is paragraph 119.

Justice STEPHENS. Let me get the answer so we will have it before us.

Mr. KNUFF. I am mistaken in my recollection as to the paragraph of the answer. That concerns perforated lath.

I did not have it before me at the time. Suppose I 2584 develop it by this witness?

Justice STEPHENS. All right.

By Mr. KNUFF.

Q. Did you appear before the grand jury on the 4th day of June, 1940?

A. Yes.

Q. And at that time, did you claim the attorney-client privilege?

Mr. ADAMS. May I respectfully object here on the ground that it is not proper to disclose proceedings before the grand jury?

Justice STEPHENS. That objection is overruled. We have got to determine whether or not this privilege was waived, and we cannot do that without hearing evidence on the subject.

By Mr. KNUFF.

Q. Did you, sir?

A. Yes, sir.



Q. And did you later contact any official of Certain-teed Products Corporation as to whether or not they would waive that privilege?

A. That is a little difficult to answer categorically. I spoke to the Assistant Federal Attorney and told him that it was my feeling that there was a privilege here and that I was in no position to waive it, but that I should assert it and, together, we called Certain-teed in New York.

2585 Q. Whom did you talk to in Certain-teed?

A. A fellow named Dowd.

Q. What was his position with Certain-teed at that time?

A. I don't know.

Q. Was he an officer of the corporation?

A. I was under the impression that he was.

Mr. KNUFF. Mr. Adams, will you admit that Mr. Dowd was an officer of the corporation at that time?

Mr. ADAMS. He was not.

Mr. KNUFF. He was not an officer of the corporation?

Mr. ADAMS. No.

Mr. KNUFF. What was his position with the corporation?

The WITNESS. I don't know.

Mr. KNUFF. I meant that for Mr. Adams.

Mr. ADAMS. I think that at that time he was comptroller, he was not an officer. That is not an officer of the corporation, it is merely a title of the man that heads up the accounting department.

Justice STEPHENS. Let me get clear on one thing, did you first claim the privilege for the document?

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. And did you contact Mr. Dowd?

A. Yes, sir.

Justice JACKSON. Is that D-o-w or D-o-w-d?

2586 Mr. KNUFF. D-o-w-d, as I understand it.

By Mr. KNUFF.

Q. What did Mr. Dowd tell you, sir?

Mr. ADAMS. I respectfully object at this point with respect to the telephone conversation between the person alleged to be Mr. Dowd, and this witness, on the ground that there has been no showing that this witness knew to whom he was talking. I would like the privilege of a preliminary examination on that point.

Justice STEPHENS. Very well, on voir dire briefly.

Mr. ADAMS. Thank you.

Mr. Redfield, had you previously ever known Mr. Dowd?

The WITNESS. No.

Mr. ADAMS. Have you ever since seen him, or have you ever seen him in your life, so far as you know?

The WITNESS. So far as I know, I have not.

Mr. ADAMS. At the time you talked to him you had never talked with him on the telephone before?

The WITNESS. Not that I know of.

Mr. ADAMS. And you had no way of identifying that person as being Mr. Dowd, had you?

The WITNESS. Not other than the fact that both the United States Attorney and myself called Certain-teed and this man answered, who we both believed was Mr. Dowd and who represented himself as such on the telephone.

2587 Mr. ADAMS. But you did not recognize his voice from any previous conversation with him?

The WITNESS. No.

Mr. ADAMS. And you have no way of telling the Court whether or not that was Mr. Dowd you talked to that day?

The WITNESS. No.

Mr. ADAMS. I respectfully object to any conversation with respect to Mr. Dowd on the telephone on the well-established rule that a witness may not testify with respect to a telephone conversation with a person otherwise unidentified, unless he can recognize the voice from previous conversations with that person, and that the statement—

Justice STEPHENS (interposing). Do you deny that he talked to Mr. Dowd?

Mr. ADAMS. I do, and I will produce Mr. Dowd in court, who will testify that until, within the last three weeks from today, when this matter came up the last time, he had never heard of Mr. Redfield in his life. I am also in a position to assert to the Court that I have canvassed every officer of Certain-teed who was with them at the time, and who is with them now, and have been unable to find anybody who talked with this witness.

I represent that to the Court because I want it clearly understood that I am not relying here on a mere technical position with respect to identification of voice, but  
2588 that I am relying on a position of substance with respect to this waiver, particularly in that Mr. Dowd, as I am in a position to prove, states that he never had any such conversation and never even heard of Mr. Redfield prior to the time this question came up in this case; and, secondly, Mr. Dowd was not authorized at that time to make any statement with respect to waiver of the privileges of this company.

Justice STEPHENS. Well, speaking for myself alone, and subject to conference with my colleagues, I will say that it seems to me that we are going to undue lengths here. As I understand the law with respect to privileged communications, particularly those that consist of documents which are under subpoena duces tecum, the witness, the person who is served with an order to produce such documents, is required to come in and produce them; he cannot refuse to produce them; he cannot refuse to obey the order of the court. But if he wants to preserve a privilege, he must claim it at the first opportunity before a proper tribunal. What has the question of agency to authorize identification got to do with the matter if that is the law?

Mr. ADAMS. Are you addressing that question to me, your Honor?

Justice STEPHENS. Yes.

Mr. ADAMS. We are claiming the privilege now, I say, for the first time that we could claim it, in this Court.

2589 Justice STEPHENS. But the law also is that a privilege once waived is waived forever. If it was successfully claimed before the grand jury, and not waived in the answer, and it is also claimed here, and if the document is confidential, it is claimed and you have got your privilege. If it was waived before the grand jury, and if waiver before the grand jury is waiver for all purposes, then what has this question of agency got to do with it?

Justice JACKSON. You contend that there was no proper waiver?

Mr. ADAMS. I contend that there was never any waiver before the grand jury made by any authorized representative of Certain-teed, and that this witness—I have no doubt about his good faith—was simply misinformed on the subject.

Justice STEPHENS. Well, I think the Court had better hear all that either side has to offer on the subject. It seems to be very important. The document seems to be one of a critical character in view of the vigor with which it is being offered and resisted, and we will hear this testimony subject to a motion to strike if it is determined later that it ought not to be in the record.

Proceed with your examination. We can't act until we know, and we can't know without listening.

Mr. ADAMS. I particularly want to reserve my objection concerning this telephone call.

2590 Justice STEPHENS. Your objection is shown.

By Mr. KNUFF.

Q. You did assert this privilege before the grand jury, did you not, the attorney-client privilege?

A. Yes.

Q. And later you identified the document dated August 2, 1929, is that correct?

A. Yes.

Q. And you did that after you had had a telephone conversation with the Certain-teed Products Corporation office in New York?

A. Yes.

Q. And whom did you ask for when you called the Certain-teed office in New York?

A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for.

Q. Did you talk to the New York office?

A. Yes.

Q. And you say you didn't recognize the voice at the other end, is that correct?

A. That is correct.

Q. And what did they tell you to do, the New York office of Certain-teed?

A. I explained what I have just explained to you, 2591 and asked what they wanted me to do, and it is my recollection that Mr. Dowd said, "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice, and so far as I can tell there is no reason that you should not testify."

Q. And you did identify the document?

A. Yes.

Mr. KNUFF. We now offer in evidence Government's Exhibit 233.

Justice STEPHENS. Show us those grand jury minutes, please.

(Thereupon, the minutes referred to were handed to the Court.)

Justice STEPHENS. Where does that end, Mr. Knuff, on page 2375 where Mr. Keller says, "I have no further questions"?

Mr. KNUFF. At the bottom of page 2375, the Exhibit 212 is referred to, and this is the exhibit.

Justice STEPHENS. What I was asking is, does the examination before the grand jury end on page 2375 where Mr. Keller says, "I have no further questions"?

Mr. KNUFF. Yes, your Honor.



Justice STEPHENS. Do I understand correctly, Mr. Knuff, that you were mistaken as to your contention that there was a waiver concerning this document in an answer?

Mr. KNUFF. Yes, that was a mistake.

2592 Justice STEPHENS. That had to do with some other document?

Mr. KNUFF. Yes.

Justice STEPHENS. We only have the question as to whether or not this privilege was waived as a result of this grand jury proceeding?

Mr. KNUFF. That is right, your Honor.

Justice STEPHENS. Do you wish to be heard?

Mr. ADAMS. On two phases of it; one, that there is nothing in this witness' testimony, it seems to me, that constitutes a waiver; and, secondly, that as he testified before the grand jury, with which we are directly concerned, he stated that he was being permitted to identify a document, and that is all, and there was no waiver, even under his grand jury testimony, of the privilege between attorney and client. Of course I contend that there is no legal proof here in the first place of any conversation with Mr. Dowd; in the second place, that the conversation, if it did take place, did not constitute a waiver; thirdly, that any waiver that took place at all was with respect to a mere matter of identity which, as your Honor says, is permissible; and, fourthly, that this proceeding is the first time that we have had the opportunity to assert this privilege. We do now assert it, and we contend that there is an absolute lack of showing by the Government that there was any waiver.

Justice STEPHENS. Mr. Knuff, do you wish to be heard?

2593 Mr. KNUFF. No, your Honor.

Justice STEPHENS. The Court will take its noon recess at this time and take this matter under advisement.

(Thereupon, at 12:05 o'clock p.m. a recess was taken to 1:45 o'clock p.m. of the same day.)

2594

#### AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Thereupon, A. D. REDFIELD resumed the stand and testified further as follows:

#### DIRECT EXAMINATION (RESUMED)

Justice STEPHENS. The Court has examined the offered document, proposed Exhibit No. 233, during the recess, and given consideration to the authorities and the contentions

of counsel. The Court is of the view that on the record the document is privileged, and that there was no waiver; that there was a claim of privilege by Mr. Redfield in the Grand Jury proceedings, and that there is no showing before the Court that he was authorized to waive the privilege thereafter; and that identification of a document does not constitute a waiver.

Mr. KNUFF. You may cross-examine the witness.

Mr. BROMLEY. No questions.

Mr. ADAMS. We have no questions.

Justice STEPHENS. You are excused, Mr. Redfield.

(Witness excused.)

Mr. KNUFF. Mr. Baumhogger, please.

2595 Thereupon, WALTER G. BAUMHOGGER, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

Mr. KNUFF. Do Your Honors have before you the photo-stats of the Baumhogger exhibits? They are identified as Item No. X-305, the first one.

Justice STEPHENS. Yes, thank you, I have them, and I think we all have them, Mr. Knuff.

By Mr. KNUFF.

Q. Will you state your name, sir, for the record.

A. Walter G. Baumhogger.

Q. Where do you live, Mr. Baumhogger?

A. Montclair, New Jersey.

Q. What is your present business?

A. President of the United Cigar-Whelan Stores Corporation.

Q. How long have you been President of United Cigar-Whelan Stores?

A. Since October, 1938.

Q. And before that, with what company were you associated?

A. Certain-teed Products.

Q. And when did you enter the employ, or when did you become connected with Certain-teed Products Corporation?

A. The last week in December, 1936.

2596 Q. And you stayed with Certain-teed Products until October, 1938, is that correct?

A. That is correct.

Q. And what was your position with Certain-teed?

A. President.

Q. Were you President all during that time?

A. Yes.

Q. Mr. Baumhogger, I show you what has been marked for Identification as Government's Exhibit 333. Will you please look at it?

Justice JACKSON. That is X-305, Mr. Knuff?

Mr. KNUFF. No, Your Honor, that is a memorandum dated May 10, 1938, and addressed to Members of Management Board.

Justice GARRETT. Is that the second one as arranged in this series?

Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. This witness was President of Certain-teed at the time he wrote this?

Mr. KNUFF. Yes, Your Honor. He was President of Certain-teed from 1937 to October, 1938, I believe.

Justice JACKSON. He succeeded George M. Brown, is that it?

Mr. KNUFF. Did Mr. Baumhogger succeed Mr. George M. Brown?

Mr. ADAMS. No, he succeeded Mr. Chester Rahr.

2597 The WITNESS. Yes, sir, I have read it.

Justice STEPHENS. Let the Court finish reading it, please.

All right, proceed.

By Mr. KNUFF.

Q. Do you recognize Government's Exhibit 333 for Identification as a memorandum which you dictated, Mr. Baumhogger?

A. Yes.

Q. And that was addressed to the Management Board of Certain-teed Products Corporation?

A. Yes, sir.

Q. And who comprised the members of the Management Board?

A. E. G. Roos, Vice-President and General Sales Manager—

Justice STEPHENS (interposing). What were his initials?

The WITNESS. E. G.

A. Whittemore, Manufacturing Vice-President; Homer Van Hagan, Manager of Gypsum Manufacturing; J. K. Norris, Vice-President and Treasurer; Thomas Dugan, Secretary and General Counsel; Owen Orr, General Purchasing Agent—I believe that is all.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 333.

2598 Mr. BROMLEY. We have only the usual objection.

Mr. FINCK. If Your Honor please, defendants Na-

tional Gypsum Company and Baker object to the admission of Exhibit 333 on the grounds that it is incompetent, irrelevant and immaterial, and is not binding on the defendants National and Baker; further, that there is no charge in the complaint which complains of any violation of any law on the part of National and Baker in the manufacture and sale of perforated lath.

Justice STEPHENS. The same objection, I take it, by Mr. Johnston for Texas?

Mr. JOHNSTON. Yes.

Justice STEPHENS. And by Mr. Oliver for Celotex?

Mr. OLIVER. Yes, Your Honor.

Mr. FINCK. If the Court please, this document only refers to perforated lath, and I believe the Government will stipulate that National Gypsum Company had no license agreement with USG to manufacture and sell perforated lath.

Justice STEPHENS. We will reserve ruling so far as the companies which did not have a license to manufacture perforated lath are concerned, National, and Celotex—

Mr. OLIVER (interposing). That is right, sir.

Justice STEPHENS (continuing). —and Texas.

Mr. JOHNSTON. Yes.

Justice STEPHENS. Otherwise, the exhibit is received in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit No. 333, was received in evidence, as noted.)

Justice STEPHENS. We hope to reach a time soon when, without inconvenience to the witnesses, we can pass on these various reserved rulings.

Proceed, Mr. Knuff.

Mr. BROMLEY. Will you excuse me, if the Court pleases? In the interest of saving confusion in the record, it was my understanding—and I would like to say so now—after perusal of the Government's written offer of proof and brief, that they had abandoned their position with respect to this class of testimony. There is contained in the brief no offer of proof with respect to this situation whatsoever, and no argument in the brief regarding it.

Isn't that right, Mr. Knuff?

Mr. KNUFF. That is not right, we do not abandon any position at all.

Justice STEPHENS. We needn't have our voices lifted, gentlemen.



The Court was puzzled itself about that. The Court expected your memorandum to apply to all the reserved rulings. It did not apply to perforated lath and metal-2600 lized lath, and we ourselves were at a loss as to whether you were continuing to insist upon that. But if you are, you have a right to do so, of course.

By Mr. KNUFF.

Q. Mr. Baumhogger, I show you what has been marked for identification as Government's Exhibit 334, the same being a memorandum dated May 16, 1938, from H. H. Van Hagan, and addressed to yourself as President. I wish you would look at that memorandum and see if you recognize it, please?

Justice STEPHENS. I am puzzled about this, Mr. Knuff. It starts out, "Referring to your memorandum of May 10", and it is addressed to Mr. Van Hagan, is it not?

Mr. KNUFF. No, it is from Mr. Van Hagan, addressed to Mr. Baumhogger.

Justice STEPHENS. Oh, I beg your pardon. That is what puzzled me.

The WITNESS. May I, while this memorandum is being read, amend a previous statement?

Justice STEPHENS. No, don't, please, because we must listen to you and we can't listen and read at the same time. We will give you an opportunity later.

The WITNESS. Yes, sir.

(The Justices then examined the proposed exhibit.)

Justice STEPHENS. All right, what correction did you wish to make?

The WITNESS. On further reconsideration, I believe I was mistaken in saying that Mr. Dugan was a member of the Management Board, although he occasionally attended its meetings.

Justice STEPHENS. Thank you.

Proceed, Mr. Knuff.

Mr. KNUFF. I don't believe Judge Garrett is through reading.

Justice GARRETT. Yes, I am.

Mr. KNUFF. All right.

By Mr. KNUFF.

Q. Do you recognize this, Mr. Baumhogger, that is, Government's Exhibit 334 for Identification, as a reply to your previous memorandum to the Management Board?

A. A reply from Mr. Van Hagan, yes.

Q. From Mr. Van Hagan, yes.

A. Yes.

Q. You recognize that as Mr. Van Hagan's reply?

A. Yes.

Mr. KNUFF. We offer in evidence Government's Exhibit 334.

Mr. BROMLEY. We have only the usual objection.

Mr. FINCK. And the same objection.

Justice STEPHENS. Ruling is reserved with respect to National, Texas, and Celotex. With respect to the others, it is received subject to the usual reservation with 2602 respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 334, was received in evidence, as noted.)

By Mr. KNUFF.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 335, the same being a memorandum from Warren Henley, dated 7/11/38, addressed to W. G. Baumhoger. Would you please look at that and tell me whether or not you recognize it?

A. Yes, sir.

Q. And you received that from Mr. Warren Henley?

A. Yes, sir.

Mr. KNUFF. If Your Honor pleases, in connection with Government's Exhibit 335 for Identification, we offer this exhibit in evidence. We do not offer the pencilled or penned longhand memorandum at the bottom of the page. We are just offering the typewritten portion. That portion at the bottom of the page is not offered.

Mr. BROMLEY. We make the usual objection.

Justice STEPHENS. Ruling is reserved with respect to National, Celotex, and Texas. Otherwise, the exhibit is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

2603 Mr. FINCK. If the Court please, that is not on the usual objection; that is on our specific objection, is it not, that you are reserving decision?

Justice STEPHENS. I am reserving decision on your objection that this class of testimony or exhibit which applies to perforated lath doesn't apply to the three companies I just mentioned. That is what we have been reserving ruling on.

Mr. FINCK. Very well.

(The document referred to, marked as Government's Exhibit 335, was received in evidence, as noted.)

Mr. KNUFF. You may cross-examine the witness.

Mr. BROMLEY. Will you give the last three exhibits to the witness, please?

(Exhibits handed to the witness.)

# CROSS EXAMINATION

By Mr. BROMLEY.

Q. Mr. Baumhogger, you had not been connected with the gypsum industry prior to the time you became President of the Certain-teed Products Corporation, had you?

A. No, sir.

Q. And since you left that company, you have had no connection with the gypsum industry whatsoever, is that right?

A. That is right.

2604 Q. Referring to Exhibit 333, and particularly to the second paragraph, you refer down near the middle of that paragraph to a commitment made by Mr. Henning at a meeting that USG would maintain the minimum price on perforated lath at a higher level over non-perforated lath, do you not?

A. Yes, sir.

Q. Now the alleged commitment to which you refer in that paragraph, if made at all, was made in 1936, wasn't it?

A. Yes, sir.

Q. And you refer to that at the end of the first sentence of the second paragraph of your memorandum, don't you?

A. May I have that question, please?

(The question was read by the reporter.)

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. You there say, in effect, that the licenses on perforated lath were offered by USG early in 1936?

A. Yes, sir.

Q. Then in the next sentence, "Acting as our representatives, Messrs. Henley and Van Hagan attended a meeting called by Mr. Henning"—that was a meeting which, as you understood it, occurred in 1936?

A. Yes, sir.

Q. Therefore, am I correct in assuming that you had no personal knowledge whatsoever as to what transpired at this particular meeting in 1936?

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A. That is correct.

Q. You weren't there yourself, of course?

A. No, sir.

Q. And at the time you dictated this memorandum, as disclosed in the first sentence of the second paragraph, you didn't even have the file before you, did you?

A. Correct.

Q. So that whatever you recited in this memorandum, so far as it related to the contents of any documents or correspondence, was based on your recollection and not on a current inspection of the files at the time you wrote the memorandum; isn't that right?

A. That is correct.

Q. How was it, then, that you heard that in 1936 Mr. Henning had made a commitment that USG would maintain, under your license, perforated lath prices at a differential above the price for plain lath?

A. May I preface my reply by saying that this is my best recollection?

Justice STEPHENS. Surely.

The WITNESS. Well, this is my best recollection. When the notice was received from United States Gypsum reducing the price of perforated lath, I telephoned Mr. Van Hagan and told him that the notice had been received, and that this meant a further reduction in our gross profit on lath, on perforated lath. And I had understood from somebody—I presume it was from Mr. Whittemore—that Van Hagan had attended the meeting with Mr. Henning, and I asked Van Hagan what his understanding was at the time that he attended the meeting. I thought he said that Mr. Henning made a commitment that a price differential of at least 25 cents would be maintained.

At a later time, however, as a matter of fact, at the Management Board meeting that was held subsequent to my memorandum of May 10—and I think also in this letter of May 16—Mr. Van Hagan told me that I had misinterpreted his remarks over the telephone; that there hadn't been a commitment made; that there had been a differential established, and that he assumed at the time that at least a 25-cent differential would be maintained.

By Mr. BROMLEY.

Q. So that after you dictated and distributed your May 10 memorandum, Exhibit 333, in which you refer to Mr. Henning's commitment, you found out that as a matter of fact the people who attended that meeting said that Henning made no commitment, isn't that correct?

A. That is correct.



Q. Isn't it a fact, Mr. Baumhoger, that you wrote this memorandum, Exhibit 333, really in order to smoke  
2607 out the facts from your subordinates, because you weren't quite sure as to what they were telling you or as to the accuracy of what they were telling you?

A. That is true; I was handicapped somewhat by the fact that Mr. Henley was in Chicago, and Mr. Van Hagan was in either Buffalo or Akron, and Mr. Whittemore was in New York, and Mr. Ernst was carting the file around with him; and there was a great deal of hearsay, and I didn't seem to be able to put all the facts together in a manner that satisfied me. And I had had an opinion from somebody, either verbal or in writing—I think it may have been from Ernst—saying something about the doubtful validity of USG's patents on perforated lath. And I was concerned about the fact that we were paying a 10-cent royalty and National Gypsum was not; and it seemed to me time to present all of the factors in a rather strong way and call the Management Board together and thresh it out.

Q. And that is the reason why, in your memorandum, Exhibit 333, you made the definite statement in the second paragraph that Henning had made a commitment to maintain the differential; isn't that right?

A. I think that was only partially the reason. I wanted to present the factors, as I say, factors rather than facts, as strongly as possible in order to aid the smoking-out process. But I am quite sure that when I dictated  
2608 this memorandum I was under the impression that in telephone conversation with Van Hagan he had said something about a commitment, which he later denied.

Q. Now I notice on page 2, starting near the bottom, of Exhibit 333, you propose that a letter be written to Mr. Knode, the President of USG.

A. Yes, sir.

Q. And you quote in your memorandum, in complete form, the wording of the letter which you suggest should be sent to Knode—is that right?

A. Yes, sir.

Q. That goes from the bottom of page 2, including all of page 3, and to the middle of page 4?

A. That is right.

Q. It ends with the sentence: "An early statement from you regarding your decision in the matter will be appreciated."

A. Yes, sir.

Q. That is the end of the letter, which you dictated in this memorandum, which you proposed should be sent to Knode?

A. Yes.

Q. Now look at the bottom of page 2, the sentence beginning, "For that reason, we are of the opinion that you are not acquainted with the assurance given us by Mr. 2609 Henning prior to our acceptance of a License for the manufacture of Perforated Lath, which assurance was to this effect:"

A. Yes, sir.

Q. And then you state definitely that the assurance was to maintain a differential above the price of plain lath, don't you?

A. Yes, sir.

Q. Now did you ever send that letter?

A. No, sir.

Q. And isn't it the fact that after you found out that your subordinates either had misinformed you or that you had not understood them, you concluded that of course you couldn't send the letter and make any such accusation as this against USG, because it wasn't true?

A. That is correct.

Q. Now will you look at the last page, page 5 of your memorandum, Exhibit 333, in the 6th line from the top, the sentence beginning, "We shall, of course, have to consult counsel to determine whether we are incriminating ourselves by admitting that we were party to an agreement to maintain the price of Perforated Lath at a higher level than Non-Perforated; . . ." Isn't it a fact, sir, that after you found out that Henning had made no commitment, there was no need to and you never did consult your attorneys about the matter?

A. That is correct. I was completely overruled by 2610 the Management Board on the contents of this letter. And an entirely different letter was sent to Mr. Knode.

Q. There was a different letter sent?

A. To my recollection. And I don't know whether I am going further than I am supposed to, but I think that Mr. Henley's letter of July 11 is in response to a request from me that he follow up Mr. Knode to ascertain why I didn't have an answer to that letter.

Justice STEPHENS. Please read that answer. I am sorry, I missed it.

(The answer was read by the reporter.)

By Mr. BROMLEY.

Q. I show you what purports to be a photostat of a letter from you to Mr. Knode, dated May 20, 1938, and ask you whether that is the letter to which you have just referred as the one which was actually sent to Mr. Knode?

Mr. BROMLEY. Before I show it to you—Mr. Steffen, do you have the original of that letter, dated May 20, 1938, from Baumhogger to Knode?

Mr. STEFFEN. May I see the letter?

(Photostat of letter handed to Mr. Knuff.)

Mr. KNUFF. I haven't any recollection of ever seeing that.

Justice STEPHENS. Do you wish to mark this for Identification?

2611 Mr. BROMLEY. Yes.

Will you please mark this for Identification as Defendants' Exhibit 18?

(The document referred to was marked as Defendants' Exhibit 18 for Identification.)

By Mr. BROMLEY.

Q. Can you identify that as your signature?

A. Oh, yes.

Q. And is that the letter which you dictated and which was sent to Mr. Knode on or about May 20, 1938?

A. I know it is. This is the letter that was sent as a result of our Management Board meeting at which this Exhibit No. 333 was discussed.

Q. You said a moment ago that at that meeting you were overruled by your Management Board. You meant, didn't you, that you were overruled as to your version of the facts as set forth in Exhibit 333, the memorandum of May 10?

A. Yes, sir.

Q. And you were convinced, weren't you, after that meeting, that the fact was that Henning had never made any commitment to maintain any price?

A. I was convinced that our people believed he had not.

2612 Q. Did you know at the very time that you wrote this memorandum, Exhibit 333, that there was in your file, or should have been, a letter from Mr. Henning on this subject, dated June 23, 1936?

A. No, sir. I heard the letter referred to yesterday, and that is the first time I knew it existed.

Q. I show you a document which has heretofore been marked Defendants' Exhibit 16 for Identification, and ask

you whether you knew, back in 1938, when you prepared Exhibit 333, that this letter from Mr. Henning on this subject was in your company's files?

Justice STEPHENS. Just a minute, Mr. Bromley, until we locate this exhibit.

Mr. BROMLEY. I have here, if the Court please, Judge Garrett's and Judge Jackson's files, which both of the Judges returned to me, which contain this letter.

Justice GARRETT. I supposed that on all of these exhibits where they are just marked for Identification and not introduced, that they should be returned to you until they are introduced.

Mr. BROMLEY. Yes, sir, and I just wanted to hand them to you now.

Justice STEPHENS. I took the file home during the recess because I wanted to have all the exhibits before me which had been talked about. I have that here; yes.

Mr. BROMLEY. I would like to ask Judge Garrett 2613 if he doesn't think, due to the fact that we are constantly referring to these exhibits for identification, that it would be more convenient for Judge Garrett and Judge Jackson to keep these exhibits?

Justice GARRETT. I am perfectly willing to keep them.

No exhibit has as yet been introduced by the defendant. All have been marked for identification but none introduced. Am I right in that?

Mr. BROMLEY. Yes, Your Honor.

Justice JACKSON. What exhibit is before the witness now, Mr. Bromley?

Mr. BROMLEY. Defendants' Exhibit 16 for Identification.

By Mr. BROMLEY.

Q. I call your attention to the second paragraph of that letter. Will you read it, please?

A. I have read it.

Q. Do you now see, sir, that that states definitely that under the contract the licensor has the right to determine to change or withdraw the minimum price or prices at which licensee shall sell perforated lath?

Mr. KNUFF. Just a moment. The question is objected to as asking for a conclusion of the witness.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. The objection is overruled on 2614 the ground that even if it does seek a conclusion, it is the type of conclusion which can be asked on



cross-examination as testing the reasonableness of the witness' previous statements.

The WITNESS. Yes.

By Mr. BROMLEY.

Q. Nobody had showed you that letter before you wrote Exhibit 333, is that what you say?

A. I don't recall ever having seen this before. I think it may have been in the company's files in the Chicago office instead of in its New York office where I was located. I see it is addressed to Chicago.

Justice STEPHENS. Which office were you in?

The WITNESS. New York.

By Mr. BROMLEY.

Q. Where was C. O. Brown's office?

A. C. O. Brown wasn't with the company while I was there.

Q. Now referring once more, please, to Exhibit 333, your memorandum of May 10, and the first paragraph, that paragraph beginning "Effective May 2nd, the U. S. Gypsum Company eliminated the differential of 25¢ per thousand feet on Perforated Lath . . ."—that refers to the fact that prior to this time your company, as licensee, had received a price bulletin from USG which reduced the price fixed by USG under the license, from \$13.25 per thousand feet to \$13.00 per thousand feet?

A. That is right.

Q. Now you didn't want the price reduced, did you?

A. No, sir.

Q. Do you recall that this was a second reduction in the price of perforated lath which USG had made prior to May 10, 1938?

A. It seems to me that there was a substantial reduction made in the price of all lath at some time, at some earlier date than 1938.

Q. I think that is right, and don't you recall specifically that so far as perforated lath was concerned, in 1937 you had received a bulletin from USG which reduced the price by \$2 a thousand, that is, from \$15.25 to \$13.25?

A. No, I can't recall that specifically. My recollection is that at some date previous to May 2, 1938, a bulletin had been received from USG reducing the price of all lath by a substantial amount, probably \$2 a thousand.

Q. I show you, Mr. Baumhogger, what has been marked Defendants' Exhibit 17 for Identification; and ask you if that isn't a memorandum from Warren Henley to C. O. Brown, dated June 24, 1936?

A. That was prior to my time. I don't see how I could be expected to recognize the memorandum.

2616 Q. Well, I call your attention to the fact that it recites that it is Henley's memorandum to C. O. Brown, dated June 24, 1936, and ask you—

Mr. KNUFF (interposing). May it please the Court, is this cross-examination?

Mr. BROMLEY. It is. It has further reference to Defendants' Exhibit 16, and in what file it was.

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. You will notice, Mr. Baumhogger, that this memorandum quotes Mr. Henning's letter to Mr. Henley of June 23, 1936, which is Defendants' Exhibit 16 for Identification, which I just showed you.

A. Yes, sir.

Q. And do you see the handwriting at the top of it?

A. Yes.

Q. And do you see that it reads, "For your file. I sent you part of file 5 days ago."?

A. Yes.

Q. Now doesn't that indicate to you, then, that so far as Henning's letter to Henley of June 23, 1936, is concerned, Defendants' Exhibit 16 for Identification, a copy of it, at least, was in the New York file all the time?

A. Well, sir, all I can say is that it seems so, but I don't know.

2617 Q. Coming back to Exhibit 333 again, please, Mr. Baumhogger, and particularly page 2, in connection with your comment in the second full paragraph to the effect that the USG's patent on perforated lath could probably not be sustained, the fact is that this perforated lath was lath made under other patents, such as the Haggerty starch and the Roos foam, and was patented board without regard to the perforated patent,—it was patented lath, I mean, in which holes were punched; isn't that right?

Mr. STEFFEN. I would like to ask, simply to get the witness' understanding on the matter, as to whether it was patented under some other patents,—I don't think he is qualified as an expert on patent matters to testify.

Justice STEPHENS. We don't understand the question. Will you read it?

Mr. BROMLEY. I guess I had better withdraw it, because I confused it so that I don't believe anybody can understand it.

By Mr. BROMLEY.

Q. Perforated lath was really ordinary lath with holes of a certain size and spacing punched in it, wasn't it?

A. That is correct.

Q. Now ordinary lath was made under the license which you held from USG which gave you the right to use 2618 the lightweight Roos foam board patent and the starch patents, and other patents, in its manufacture, wasn't it?

A. I don't know what patents it gave us the right to use. All I know is that we had a license from USG to manufacture ordinary lath.

Q. Well, the lath in which you punched these holes was the lath which you manufactured under your general license, wasn't it?

A. Oh, yes.

Q. And under your general license, USG had the right to fix the prices for lath made by virtue of its terms?

A. That is correct.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any other cross-examination by Defendants' counsel?

Mr. ADAMS. No, sir.

Mr. FINCK. No, sir.

Justice STEPHENS. Any re-direct examination?

Mr. KNUFF. No re-direct examination, Your Honor.

Justice GARRETT. Mr. Bromley, I wanted to ask you, this batch here begins with Defendants' Exhibit No. 14. Have I returned to you the others up to Exhibit 13?

Mr. BROMLEY. No, Your Honor.

Justice JACKSON. I retained mine.

Justice GARRETT. Then I guess I retained mine.

2619 Justice STEPHENS. Is this witness to be excused, gentlemen?

Mr. KNUFF. As far as the Government is concerned.

Mr. BROMLEY. Yes, we have no further questions.

Justice STEPHENS. Then you are excused, Mr. Baumhoger, and thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. We will take a recess of five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2620 Justice STEPHENS. Proceed, gentlemen.

Mr. KNUFF. May it please the Court, the next two witnesses normally wouldn't be here until some time later. They are called out of order because the witness that we had anticipated using at this time, Mr. Tomkins, was engaged in some defense activities and at the request of Mr. O'Donnell last week we hurriedly substituted these two witnesses for Mr. Tomkins. Mr. Tomkins, I understand, will be here in Court on Thursday morning.

The next two witnesses will testify as to an entirely different branch of the case from anything we have previously been considering.

Justice STEPHENS. Very well.

Mr. KNUFF. Orin F. Perry, Jr.

Thereupon, ORIN F. PERRY, JR., a witness appearing for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

By Mr. KNUFF.

Q. Will you state your name, please, for the record?

A. Orin F. Perry, Jr.

Q. Where do you live, Mr. Perry?

A. Dobbs Ferry, New York.

Q. In what business are you now engaged?

2621 A. At the present time, with General Motors Corporation.

Q. In what capacity?

A. In the Purchasing Department.

Q. How long have you been with General Motors?

A. Three months.

Q. And before that what was your business?

A. Orin F. Perry & Son, Inc.

Q. And what was the business of Orin F. Perry & Son, Inc.?

A. Wholesale distributors of building material.

Q. And that building material consisted of what?

A. Gypsum, lime, board, roofing and clay products.

Q. How long had you been engaged in the wholesale distribution of building material?

A. Personally, since 1919.

Q. And how long had the corporation been engaged in that business?

A. Since that time, since its organization.



Q. The corporation was organized in 1919?

A. That is right.

Q. And it was engaged in the wholesale distribution of building materials?

A. That is correct.

Q. And engaged continuously from 1919 up until about three months ago.

A. No, up until March, 1942.

2622 Q. In March, 1942, the company ceased to engage in that business?

A. It ceased to engage in that business, that is correct.

Q. And from 1942 until you became connected with General Motors, what were you doing?

A. I was in Greenland.

Q. Greenland?

A. Yes.

Q. Now you say you were engaged in the wholesale distribution of building materials. Were you so engaged in 1930?

A. Yes, sir.

Q. Were you handling any gypsum lath and gypsum wall-board at that time?

A. Yes, sir.

Q. Were you handling that as a wholesaler?

A. Yes, sir.

Q. Now do you know what I mean by a "wholesaler"?

A. Well, a "wholesaler" distributes to dealers, as against a retailer distributing to contractors.

Q. Were your sales confined solely to dealers?

A. Dealers, yes, sir.

Q. You did not supply contractors?

A. No, sir.

Q. From whom did you obtain your source of supply of lath and board?

2623 A. At that time, from the Certain-teed Products Corporation.

Q. And for how long a period previous to 1930 had you been obtaining your board and lath from Certain-teed Products Corporation?

A. We started in 1930, I believe.

Q. You started to handle gypsum board and gypsum lath in 1930?

A. We had handled other manufacturers' materials previous to that, though.

Q. Had you handled any board and lath previous to that?

A. Yes.

Q. From whom did you obtain your source of supply previous to that?

A. American Cement Plaster Company; Beaver Products Company; Universal Gypsum and Lime Company—then I guess from Certain-teed.

Q. Now you say that you started to handle Certain-teed's products around about 1930?

A. Yes.

Q. At that time did Certain-teed tell you at what price you were to sell gypsum wallboard and gypsum lath?

A. Yes, sir.

Mr. ADAMS. Just a moment, sir, I object to this unless the time and place be fixed, and the identity of the 2624 individual with whom the conversation is alleged to have been had.

Mr. KNUFF. We will come to that in a very few minutes. This is preliminary to that. I will fix the time and the place and the person that told it to him.

Justice STEPHENS. Proceed.

Mr. BROMLEY. I object to the question on the ground that it is immaterial. There is no charge in the complaint that affects the resale prices of wholesale distributors.

Mr. KNUFF. There is a charge in the complaint that they did fix the price of plaster, that there was a conspiracy here to fix the resale price of plaster. There is a definite allegation in the complaint to that effect.

Mr. BROMLEY. Where is that?

Mr. KNUFF. Paragraph 45 (c) says, "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area".

Mr. BROMLEY. The only charge about plaster in the complaint is that the defendant companies agreed on prices, and that they didn't have any right to because plaster was not patented. There isn't any charge anywhere in the complaint that these defendants controlled the resale price of plaster. That has never been suggested at any time, anywhere.

Justice STEPHENS. The charge concerning resale has to do with manufacturing distributors, does it not?

2625 Mr. BROMLEY. Yes, sir.

Justice STEPHENS. What paragraph is that in?

Mr. BROMLEY. Paragraphs 108 to 111.

Mr. STEFFEN. And also 45 (e).

Justice STEPHENS. Do you wish to be heard on this, Mr. Knuff?

Mr. KNUFF. If your Honor please, I think clearly that the question is certainly admissible under paragraph 44 of the complaint which states the offenses with which the defendants are charged, that is with violation of the Sherman Act, and one of the violations of the Sherman Act is the fixing of prices.

In paragraph 45 (c) we have set forth one of the effects of it, which was that they were, "concertedly raising, maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products manufactured and sold by said companies in the Eastern area":

Now it seems to me that that comprehends the fixing of prices for plaster. This doesn't approach the problem that our offer will cover later on. This isn't a question of it being manufactured and sold. This is a question of fixing the price of plaster by these companies, and we propose to show by this witness that the Certain-teed Products Corporation did fix the prices of plaster, as one of the effects of the conspiracy.

Mr. BROMLEY. There is no charge of that kind 2626 ever suggested in the complaint anywhere.

Justice STEPHENS. It seems to the Presiding Judge that the question really raises the same question that we had before us on the offers of proof, and the memoranda which have been submitted by the Government and defendants' counsel, as to whether or not when a complaint has been drawn as specifically as this one, and followed by a bill of particulars, the Government can, nevertheless, introduced evidence concerning alleged violations of the Sherman Act which are not mentioned in the complaint.

The Court is distressed to have this question raised again, because either we must hold the witnesses over, and have that question argued out and get a ruling on it, and get it decided, if it is going to have to be met from time to time, or we must take the testimony subject to a motion to strike.

How long will the testimony of this witness take?

Mr. KNUFF. I don't think over an hour.

Justice STEPHENS. And the next witness will be on the same subject?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. And will take about an hour?

Mr. KNUFF. The next witness will probably be longer than an hour.

Justice STEPHENS. And what is the personal convenience of these witness with respect to their business?

2627 Mr. KNUFF. I have never——

The WITNESS. Mine is bad.

Mr. KNUFF. What do you mean by that, Mr. Perry?

The WITNESS. I would like to be back tomorrow, if possible.

Justice STEPHENS. What is the name of the other witness?

Mr. KNUFF. Mr. Higgins.

Justice STEPHENS. Does your business demand your presence right away, Mr. Higgins? I presume it does.

Mr. HIGGINS. I am at the convenience of the Court, sir.

Justice STEPHENS. Thank you.

Mr. STEFFEN. I had thought, if I might say a word, that we might finish with Mr. Perry this afternoon very shortly, and then adjourn until tomorrow, and we will have Mr. Higgins only, as an additional witness, before Mr. Tomkins goes on Thursday. Then, tomorrow, we might have such discussion as the Court might like on this broad question. I think we would like to be heard on the offers of proof.

Justice STEPHENS. That is a good suggestion, except for this, that the Government's memorandum came in so late last week that we didn't get the defendants' memorandum until Monday morning, and we have been sitting all day since then and reading the record in the evening, and we haven't had a chance to examine the authorities presented by the defendants.

I am afraid we are going to have to take a day's recess to determine this question which is becoming so important.

2628 Mr. STEFFEN. It is very important, your Honor, and I would favor that.

Mr. KNUFF. If your Honors didn't get the Government's memorandum until late last week, there is certainly something the matter with our mailing room, because it left our office a week ago last Saturday. I would certainly be glad to find out just exactly what is the matter with our mailing room.

Justice JACKSON. I didn't get mine until Wednesday.

Mr. BROMLEY. And neither did I.

Mr. KNUFF. They left our office, I think, a week ago last Saturday.

Justice STEPHENS. I am very glad to know that, Mr. Knuff, because we were much disappointed at what we



thought was the tardiness in its presentation, because we specifically asked the Government to present it early in the recess, so that we would have full opportunity to consider it, and the defendants' memorandum, during the recess, and not have to interrupt the witnesses or take the time of the Court out of session. I am glad to know that.

Mr. KNUFF. I am surprised at your Honor's statement.

Justice STEPHENS. It might have been in the office of the clerk of the court, so we will not blame anyone until we have further proof.

Mr. JOHNSTON. May I say in that connection, that I didn't get my copy until two hours before I left to  
2629 come up here on the train. So I think, whatever the accident may have been, it must have been general. It was my understanding that these were to have been furnished us within a few days after the adjournment on the 21st of December. Of course counsel for the defendants had only a few hours to prepare and submit their response.

Justice STEPHENS. It is a matter we do not wish to rule on hurriedly because the Government states it is an important part of its case, and the defendants' objections are vigorous, and we wish to be sound in our ruling upon it, and soundly advised before we rule.

So I think we will have to again take the testimony of these witnesses subject to a motion to strike after we have an argument and have had opportunity to consider the memoranda and authorities contained therein. I fear we shall have to take a recess, if necessary, of a day to consider those authorities. So you may proceed, subject to the right of the defendants to move to strike this testimony in accordance with a later ruling if such a motion is then proper.

By Mr. KNUFF.

Q: I believe, Mr. Perry, I asked you whether or not Certain-teed ever told you the price at which you should sell plaster and board?

A. They did.

Q. When was that?

2630 Mr. BROMLEY. Just a moment. I didn't hear the question. May I have it read, please?

Justice STEPHENS. Read the question.

(Thereupon, the second preceding question was read by the reporter).

Mr. BROMLEY. I object to the form of the question as leading and suggestive, and as calling for a conclusion. That is not the proper way to develop testimony of that importance. I move to strike the answer.

Justice STEPHENS. The Court thinks, Mr. Knuff, it would be preferable if the reverse order were used because the testimony, if this is an issue in the case, is critical, and the conventional way of asking questions of that sort is to ask whether or not the witness had a conversation with such-and-such a person on or about such-and-such a date, and then ask what was stated. This witness needn't be led, apparently.

The motion is granted.

By Mr. KNUFF.

Q. Did you have a conversation with anyone connected with Certain-teed concerning the price at which you should sell board?

A. Yes, sir.

Q. When was that?

A. When we first started in with them in 1930.

Q. With whom did you have that conversation?

2631 A. Mr. Smith was the sales manager at that time. I talked with him and also with Mr. Turner, a salesman.

Q. Do you recall Mr. Smith's first name?

A. I think his initials were E. E.—but I am not sure.

Q. And he was the sales manager for what concern?

A. Certain-teed Products Corporation.

Q. And Mr. Turner was——

A. (Interposing.) Salesman in New York City for the same company.

Q. Mr. Smith was the sales manager for Certain-teed in New York City?

A. Yes, sir.

Q. Will you just relate to the Court the conversation that you had?

Mr. BROMLEY. I object to that as immaterial because there is no charge in the complaint which covers resale price fixing as to board, and he has now shifted, as I understand it, from plaster to board. There still is no charge in the complaint as to board price fixing to this class of trade.

Justice STEPHENS. Your objection may be recorded. It is overruled at this time, subject to the right to move to strike the testimony on the final argument on this question of the extent to which the complaint permits proof of this type of alleged violation of the Sherman Act.

2632 Mr. BROMLEY. I would like to record my objection on the ground of incompetency also, because not binding on any defendant but Certain-teed.

Mr. KNUFF. I realized that the question I asked of this witness was different, and I did that in view of your Honor's ruling. Originally my question was as to plaster, which I didn't think there could be any question about.

By Mr. KNUFF.

Q. Will you relate just what you said to Mr. Smith, and what he said to you, concerning the resale price of plaster and board?

Mr. BROMLEY. May we have the same objections to this and all subsequent questions and testimony?

Justice STEPHENS. Yes. The defendants, each of them, may have an objection recorded as to this class of testimony, whether it applies to plaster, board or miscellaneous gypsum products, on the ground, that as to the defendants other than Certain-teed, it does not bind anyone but Certain-teed. We will rule on the whole thing at the close.

By Mr. KNUFF.

Q. Will you answer the question?

A. When we started in with Certain-teed we took in a full line of gypsum products, and to be competitive in the New York market we had to know the resale price to meet competition.

Q. You had to know whose resale price?

2633

A. Certain-teed's resale price.

Q. Yes?

A. So we were given a price list as to what we were to charge for each kind of material.

Q. Who gave you that price list?

A. Mr. Smith, as I recall it.

Q. What did Mr. Smith tell you at the time he gave you that, if he told you anything?

A. He told us that we would have to sell material at those prices, and at those prices only.

Q. And did you agree to do that, sir?

A. Yes, sir.

Q. And did you receive one price list, or more than one price list?

A. There were revisions every month or so, and we would keep getting a new copy.

Q. And would the price list be a printed price list or an oral price list?

A. No, we received first an oral price list and later on a printed copy.

Q. And the instructions that Mr. Smith gave you, were they oral or written?

A. They were oral at first, and later on we received written price lists.

Q. No—the instructions as to at what price you  
2634 should sell, were they oral or written?

A. The instructions as to at what price we should sell for, were oral.

Q. Always oral?

A. We were just told to follow the price list.

Q. And on how many different occasions were you told that?

A. As I recall it, only at one time. We always followed the price list.

Q. You were told that once, and that is the only time you were told that?

A. Yes.

Q. What did you tell Mr. Smith when he told you that?

A. I told him we would follow his instructions.

Q. Now how long did you sell plaster and board for Certain-teed under those circumstances?

A. I think our agreement came to a close on the first of January, 1933.

Q. And do you recall whether you had any conversation with Certain-teed at that time, when it was terminated?

A. No, the termination was due to the fact that Certain-teed opened their own metropolitan warehouse.

Q. After 1933 did Certain-teed sell you as a jobber?

A. No, sir.

Q. They didn't sell you as a jobber?

A. No, sir.

2635 Q. Did you make any effort to buy from them at a jobber's discount?

A. Well, when our contract terminated they told us at that time that they were going to eliminate jobbers.

Mr. BROMLEY. Who is "they"?

The WITNESS. Certain-teed.

Mr. BROMLEY. I move to strike out the answer as a conclusion.

Mr. KNUFF. That is not a conclusion, it is what they told him.

Mr. BROMLEY. Who told him? What did he say?

Mr. KNUFF. If you will just be patient, I will endeavor to find out.

Mr. BROMLEY. I move to strike out the answer as not the proper way to testify to a conversation.

Mr. KNUFF. I don't know of any more appropriate way than that, than for the witness to tell what was said.



Justice STEPHENS. Well, Mr. Knuff, the Court has been exceedingly patient with leading questions on the part of the Government because some of them were preliminary, and because you were dealing with witnesses whose testimony concerned events of long years ago; but with due respect to your view, you are not proceeding in the usual way in asking these questions. You should ask the question if he had a conversation with such-and-such a person, what the subject of the conversation was, and what was stated. Otherwise, you put the witness' characterization of the conversation in. Objection, sustained.

Mr. BROMLEY. May the answer be stricken, if your Honor please?

Justice STEPHENS. It may be stricken.

By Mr. KNUFF.

Q. When did you say you ceased to buy board and plaster from Certain-teed?

A. January 1, 1933.

Q. Now at that time did you have any conversation with anyone in Certain-teed concerning that?

A. Mr. Smith came up to see us and told us that it was going to be their policy to eliminate jobbers, and that they were going to open their own warehouse in Jersey City to cover the New York Metropolitan area.

Q. He told you it was going to be whose policy?

A. Their policy.

Q. And from that time on were you able to purchase gypsum board and gypsum plaster at a discount from Certain-teed?

A. No, sir.

Q. Did you subsequently try to buy from Certain-teed?

A. Not that I remember.

Q. Did you have any warehousing arrangement with Certain-teed?

2637 A. Not after that date.

Q. Previous to that date, did you have?

A. Previous to January 1, 1933?

Q. That is right.

A. Yes, sir.

Q. And what was that arrangement?

A. It was an arrangement whereby they made us specific allowances for unloading carloads of their material, hauling to our warehouse, handling, rent, and trucking.

Q. And will you just tell us what that arrangement was?

A. Well, we carried a full stock of their material and

after it was unloaded in the warehouse, Certain-teed could sell that material out of our warehouse for their own account, or we could sell it out of our warehouse for our account; and we were allowed on all the material we handled a certain sum for handling.

Q. And how much were you allowed on all the material you sold?

A. The allowance came in the form of an allowance for trucking and warehousing and handling. There was no sales allowance distinctly.

Q. And how much were you allowed for trucking?

A. It was a set price of so much a ton, covering all products.

Q. And what was that price?

2638 A. Each product covered a different amount, and each territory was a different amount. For instance, Brooklyn would be, say, \$1.25 a ton.

Q. For what?

A. Plaster products.

Q. Anything that you hauled to Brooklyn you would get \$1.25 a ton on?

A. For trucking.

Q. For trucking?

A. That is right.

Q. And suppose you hauled something up to the Bronx, what would you get?

A. Possibly 75 cents a ton.

Mr. ADAMS. May I inquire whether this was pursuant to a written contract?

Mr. KNUFF. I think that can be brought out on cross-examination.

Mr. ADAMS. Well, if it is pursuant to a written contract, I don't think the witness ought to be permitted to testify. I think the contract ought to be produced or its absence explained.

Mr. KNUFF. That isn't a suit on the contract at all.

Justice STEPHENS. That is very true, but the Court was surprised that objection was not made earlier, because this witness is apparently stating his conclusions as to  
2639 these arrangements, his own understanding of them, and since the Government is relying upon these prices and arrangements, it would seem to the Court that the best evidence ought to be introduced. Now that may be, of course, in the form of conversations with some sales manager. It may be in the form of bulletins or price lists. It seems to the Court that the objection is well taken, Mr. Knuff. You had better inquire more precisely as to where

the witness got these understandings, and then if they were, of course, from conversations with Mr. Smith or other persons, he can tell what was stated. If they were from written arrangements, then we should know what they are, under the best evidence rule.

Mr. KNUFF. My understanding, from what this witness said, is that Mr. Smith would give him the price list and tell him that these were the prices he must sell at, and that he told him that on one occasion——

Justice STEPHENS (interposing). We are not talking about that, Mr. Knuff, that is all in. We are talking now about these sales arrangements.

Justice JACKSON. The trucking charges.

Mr. KNUFF. I understand that.

By Mr. KNUFF.

Q. Were these trucking arrangements oral or verbal?

A. They were in an agreement.

Q. Do you have that agreement?

2640 Justice JACKSON. They were in writing, you mean?

The WITNESS. They were all in writing.

By Mr. KNUFF.

Q. Do you have that agreement?

A. I might be able to locate it; I haven't it with me.

Q. You don't have it with you?

A. No, sir.

Mr. ADAMS. Under the circumstances I move to strike out all the testimony with respect to these arrangements. It is apparent that the witness has not even been asked to produce the agreement. It may well be in existence. The witness says he might be able to produce it. If he can, I think he ought to.

Mr. KNUFF. Will Mr. Adams produce for us the agreement entered into between Certain-teed and Orin F. Perry?

Mr. ADAMS. I certainly will if I have it. I don't have it here in the courtroom, but I can assure you that if I have it I will produce it.

Justice STEPHENS. Do you have it accessible in Washington?

Mr. ADAMS. I did not know about this witness being called, your Honor, and I don't know whether I have it in the Washington office or not. I will have to look for it at the conclusion of the testimony today. It may be that I have it. Unfortunately, I haven't brought my files for the

years 1930 to 1933 here with me today. I have a pretty clear recollection, your Honor, that it was sub-2641 poenaed. I am not sure about that, but I think it was.

Justice STEPHENS. The motion to strike is granted.

By Mr. KNUFF.

Q. Mr. Perry, you say that in 1933 you were told by Certain-teed that it was their policy not to sell through jobbers any more, is that correct?

A. That is right.

Q. Subsequent to that, did you make any attempt to buy, as a jobber, from any other gypsum manufacturer?

A. Yes, sir.

Q. From what company?

A. I tried the Ebsary Company.

Q. What conversation did you have with the Ebsary Company?

A. I was told that—

Mr. ADAMS (interposing). Just a moment, please. Mr. Varian is not here, but I object to this on the ground that he ought to identify or state with whom he talked and the time and place.

Justice STEPHENS. Mr. Knuff was about to ask that question, I believe.

Mr. ADAMS. I am sorry.

Justice STEPHENS. Whom did you talk to?

The WITNESS. Mr. Lenci.

Justice STEPHENS. About when did you do so?

2642 The WITNESS. About three years ago.

By Mr. KNUFF.

Q. What did Mr. Lenci say to you?

Justice STEPHENS. Where was your conversation?

The WITNESS. In New York City.

Mr. ADAMS. I object to any conversation subsequent to the filing of the complaint. The complaint was filed in August, 1940. A conversation three years ago with Mr. Lenci cannot have anything to do with this case.

Justice STEPHENS. Well, it might or might not. It might constitute an admission. We can't tell until we hear it.

By Mr. KNUFF.

Q. You said you had a conversation with Mr. Lenci?

A. Yes.

Q. What did you say to Mr. Lenci?

A. I asked him if it was possible for him to give us a distributor's allowance on gypsum board.



Q. What did Mr. Lenci say to you?

A. "No."

Q. Did he tell you why?

A. No.

Q. Did you make any efforts to buy board from any other manufacturer?

Mr. ADAMS. At this point I move to strike out the testimony with respect to the conversation with Mr. Lenci.

2643 Justice STEPHENS. What do you claim for this,

Mr. Knuff, since the conversation relates to a time after this suit was commenced?

Mr. KNUFF. I don't think it makes any difference whether it relates to a time after the suit was commenced, or not. The conspiracy can exist right up to the present time, and we can show it existing up to the present time. The filing of the suit did not toll the time of the conspiracy. The conspiracy exists up until it is actually discontinued.

Justice STEPHENS. I think that is correct. The motion to strike is denied.

By Mr. KNUFF.

Q. Did you subsequently make any effort to obtain any board from other companies?

A. I tried the Adamant Company of New Haven, Connecticut.

Q. The Connecticut Adamant Company?

A. Yes, but they do not manufacture board and they couldn't help me any.

Q. Did you try to buy board from any other manufacturer other than Certain-teed and Ebsary?

A. I tried National Gypsum.

Q. When was that?

A. Since 1940.

Q. Who did you see at National Gypsum Company?

A. I think I talked to Mr. Cerruti.

2644 Q. And who is Mr. Cerruti?

A. He is the New York sales manager.

Q. When did you talk with Mr. Cerruti?

A. I used to talk with him quite often. I used to distribute their lime products, and I used to see him every two weeks or so.

Q. In connection with attempting to buy board, when did you talk with him?

A. I should say it was in 1940 or 1941.

Q. What did you ask Mr. Cerruti?

A. I asked him if there was any possibility of us getting a distributor's allowance on board.

Q. What did he tell you?

A. He said there was no possibility.

Q. Did you talk with any other companies?

A. I think that was all.

Q. Just the National, Ebsary, Certain-teed and Adamant?

A. Yes.

Q. Did any of these companies tell you why they would not give you a distributor's discount?

A. Well, I was led to believe—

Q. (Interposing.) Did they tell you why they wouldn't give you a distributor's discount?

Mr. ADAMS. I object to that unless it is specified as to each company, as to who he talked to and the time, 2645 with reasonable certainty, and the place.

Mr. KNUFF. I will fix that.

Mr. ADAMS. He is wholesaling it. I object to this method of asking this kind of a leading question and then trying to tie it down to a particular person.

Justice STEPHENS. The objection is sustained, but the ruling does not foreclose you from asking this witness with respect to each one of these conversations, what he was told on that subject.

By Mr. KNUFF.

Q. What, if anything, did National tell you as to why they would sell you at a distributor's discount?

A. Well, after my experience with Certain-teed, when they told me there would be no more jobbers—

Q. (Interposing.) Who told you there would be no more jobbers?

A. Mr. Smith of Certain-teed. I took it for granted that the others were all in the same boat.

Mr. ADAMS. I move to strike out the answer.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Did National tell you why they wouldn't sell you as a distributor?

Mr. ADAMS. I object to that. It has already been answered. He said he had no conversation with them on that subject.

2646 Justice STEPHENS. Whom did you talk with, if anyone, in National?

The WITNESS. Mr. Cerrutti.

Justice STEPHENS. What did he tell you, if anything, on that subject?

The WITNESS. He told me that he couldn't sell me any gypsum board at a discount.

By Mr. KNUFF.

Q. Did he tell you why?

A. No, he did not.

Q. Now did Mr. Lenci tell you why he couldn't sell you any board at a discount?

A. No, he didn't.

Q. And the only person who told you why he couldn't sell you at a discount was Mr. Smith of Certain-teed?

A. At the termination of our agreement, that is correct.

Q. And you had been selling board and lath, board and plaster, from 1930 to 1933, is that correct, that is Certain-teed Products Corporation board and plaster?

A. That is right.

Q. And this conversation that you had with Mr. Smith took place when?

A. Around the first of January, 1933.

Q. I am not sure whether the record is clear on this, Mr. Perry. You say that your company went into  
2647 business in 1919, is that correct?

A. That is right.

Q. When did you start to job gypsum products?

A. Immediately.

Q. And what gypsum products did you job?

A. We started in with Canadian plaster products, imported.

Q. And you acted as a jobber from 1919 until when?

A. Until 1942, when we closed the company.

Q. Now when did you start to job board?

A. I think about in 1923, with the American Cement Plaster's open-edge board.

Q. And do you recall any other companies for which you acted as a jobber as to board?

A. Beaver Products Company and Universal Gypsum.

Q. I wasn't sure that that was in the record.

Mr. KNUFF. You may cross-examine the witness.

2648

#### CROSS EXAMINATION

By Mr. BROMLEY.

Q. Was the Mr. Smith you talked about E. W. Smith?

A. That is right.

Q. Known as Pat Smith?

A. Yes, a great big fellow.

Mr. BROMLEY. May it please the Court, do I understand this witness is going to be recalled to produce the contract?

Can you answer that, Mr. Knuff?

Mr. KNUFF. I haven't seen the contract yet, so I don't know just exactly whether he is going to be recalled or not, until I see the contract.

Mr. BROMLEY. As I understand it, there is nothing to cross-examine on as to this witness, as to his relations with Certain-teed, under Your Honors' ruling, since it now turns out that those relations, whatever they were, were embodied in written contracts.

Justice STEPHENS. No, that is not quite correct. The Court ruled on the motion to strike that portion of the testimony which had to do with these trucking charges and the like, but the testimony concerning his price arrangements was not stricken out. There wasn't any motion to strike that out, except the general objection that they were not within the issues; that is to say, the best evidence rule wasn't invoked with respect to them.

2649

By Mr. BROMLEY.

Q. Was there anything in the written contract or contracts that you speak of, with Certain-teed, about the prices you should charge?

A. No, sir.

Q. Now what commission did you get for selling Certain-teed board, 15 percent?

A. With trucking, it would amount to that.

Q. Fifteen percent commission?

A. Yes.

Q. So that you were a sort of a warehousing agent for Certain-teed?

A. That is right.

Q. And Certain-teed made inventories every 30 days, of its material in the warehouse?

A. At the end of every month.

Q. At the end of every month?

A. Yes.

Q. And the price lists that you say you got were the price lists which Certain-teed issued to its own salesmen and agents covering prices on its own products?

A. That is correct.

Q. And in 1932, or 1933, you got into litigation with Certain-teed, didn't you?

A. That is right.



2650 Q. You brought a suit against them for damages, didn't you?

A. Well, it wasn't damages. The contract was terminated without allowing us to continue to fill agreements we had made.

Q. So you sued them for some mon ?

A. Yes.

Q. And it was after that that they refused to do business with you?

A. No, the suit was 6 months after the contract was terminated, I believe, or 3 months afterward.

Q. Well, at any rate, after you brought the suit, Certain-teed didn't do any more business with you?

A. They didn't do any business before we brought suit,

Q. And they didn't do any business afterwards either, did they?

A. No, not afterwards, either.

Q. Did they send you a written notice of termination of your contract?

A. No, sir.

Q. Just an oral notice?

A. Mr. Smith came up and told us.

Q. By the way, were you the only warehouse agent that Certain-teed had in the New York metropolitan area?

2651 A. The only one that I know of.

Q. And after they discontinued with you, you said they opened their own warehouse?

A. In New Jersey.

Q. And they served the same area that you had served for them?

A. That is correct.

Q. Now at all times subsequent to 1932, you could buy board from any manufacturer, couldn't you?

A. Not the closed-edge board.

Q. Isn't it a fact that you could buy all the board you wanted to, of the closed-edge type, from any manufacturer, and your only inability was to buy at a discount?

A. That is correct.

Q. They would sell you at the dealer's price, wouldn't they?

A. Yes.

Q. All you wanted?

A. All you wanted.

Q. So your only complaint was that they wouldn't give you 15 percent discount?

A. Well, whatever the discount was, they wouldn't give us any.

Q. They wouldn't give you any?

A. That is right.

2652 Q. And they told you, didn't they, that under the license they had from USG, they were only permitted to sell you at the price fixed by USG, and that that did not include a discount?

A. That is what Mr. Smith told me at that time.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any cross-examination by other defendants?

(No response.)

Justice STEPHENS. Any re-direct-examination?

Mr. KNUFF. No re-direct-examination, Your Honor.

Justice STEPHENS. Do you wish this witness to be excused subject to recall?

Mr. STEFFEN. Yes, subject to recall when we see the contract that he speaks of.

Justice STEPHENS. And you will notify him when you need him?

Mr. STEFFEN. Yes, we will.

Justice STEPHENS. You may be excused, then, subject to recall.

Mr. ADAMS. May it be understood that he be subject to recall by either side? I don't know how it is left up in the air here. Is he a witness still on the stand but temporarily excused, or is he going to be recalled——

Justice STEPHENS (interposing). He may be re-  
2653 called by either side on reasonable notice to the witness.

Mr. ADAMS. Thank you. That would enable us to cross-examine further if we desired?

Justice STEPHENS. Yes, you may reserve the right to cross-examine further if you desire.

Mr. ADAMS. Thank you.

(Witness excused, subject to recall.)

Justice STEPHENS. When did you say you expected Mr. Tomkins to be here?

Mr. STEFFEN. Thursday morning.

Justice STEPHENS. How long will he be on the witness stand?

Mr. STEFFEN. About a day and a half or possibly two days.

Justice STEPHENS. This next witness will be on how long?

Mr. STEFFEN. Half or three-quarters of a day, I talked to Mr. Higgins and he said he could spare tomorrow. He has a plane reservation for Friday. Tomorrow is Wednesday. We could put his testimony on Thursday and postpone Mr. Tomkins' for an additional day.

Justice STEPHENS. The trouble is, we haven't had an opportunity to read these authorities. We will have to have a free half day for that in some way. Is this witness going to be one the same subject as the witness that has  
2654 just left the stand?

Mr. STEFFEN. Mr. Higgins is a jobber. I don't think it will raise the question that was raised here in quite the same form.

Justice STEPHENS. Well, if that is true, probably we had better proceed and get through with that witness, and then perhaps we had better adjourn then and Mr. Tomkins can come down the first of the week. We are beginning to be fearful that we will bog down completely in these reserved rulings, and we would like to get a disposition of them and if necessary take a couple of day to do so.

Mr. STEFFEN. All right.

Justice STEPHENS. So we will resume again tomorrow morning, and you may call the next witness at that time; and when he is through we will adjourn until we get a disposition of these reserved rulings.

(Thereupon, at 3:57 o'clock p.m., the proceedings were adjourned until 10:00 o'clock a.m., Wednesday, January 19, 1944.)

2655 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; AND FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

*Washington, D. C., Wednesday, January 19, 1944.*

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

2672 Justice STEPHENS. Call your next witness.

Mr. STEFFEN. Mr. Higgins, please.

2673 Thereupon, CHARLES A. HIGGINS, appearing as a witness for and on behalf of the United States, having been first duly sworn, testified as follows:

#### DIRECT EXAMINATION

Mr. STEFFEN. I have to make one statement out of order, in regard to Mr. Bromley's statement concerning the Beaver answers. We do not agree with his version of what took place between counsel.

Justice STEPHENS. You do not what?

Mr. STEFFEN. Agree with Mr. Bromley's statement of what took place between counsel.

Justice STEPHENS. Very well.

Proceed, gentlemen.

By Mr. STEFFEN.

Q. Will you state your full name for the record?

A. Charles A. Higgins.

Q. And where do you live, Mr. Higgins?

A. Buffalo, New York.

Q. What business are you engaged in?

A. Jobber of building materials.

Q. What is the name of your business?

A. Quality Materials Company.

Q. How long have you been conducting that business, Mr. Higgins?

A. Since the fall of 1937.

Q. And what were you doing prior to that?

2674 A. Immediately prior to that I was employed by the National Gypsum Company.

Q. For what period of time?

A. From the fall of 1928 until I started the Quality Materials Company.

Q. And what were your duties with the National Gypsum Company?

A. My immediate assignment was the education of the sales organization on finished lime products, which lasted



for a period of 90 days, after which I was appointed Central Sales Manager.

Q. For the National Gypsum Company?

A. Yes, sir.

Q. What territory did that cover?

A. That covered what was termed the Central Division.

Q. And could you give us an idea of the territory?

A. That ran from Florida over to Louisiana, up to and including half of the State of Michigan, running on a line, taking in Tennessee, Ohio, half of Michigan, east as far as Pennsylvania. It did not take in the Carolinas. It included Kentucky and West Virginia.

Q. Do you recall how many salesmen you had under your supervision during this period?

A. Well, the figures ranged as the business grew, and the volume, and the market was available. I would say that the number varied from 20 to 50. That is purely a guess.

2675 Q. Well, that is an approximation, as I understand it, of the number of men that were employed during that period?

A. Yes, sir.

Q. What products were the National people selling at that time, starting with 1928, when you came with the company, September, 1928, I believe?

A. When I first entered their employ, they were selling strictly gypsum products. By that I mean wall plaster and gypsum wallboards.

Q. What sort of a board were they making in the fall of 1928?

A. They were making a board that we referred to as a lighter and stronger board and a board that was somewhat thicker than the competitive boards on the market. I forget the exact caliber of the board, but it was a board that we referred to as lighter and stronger, and it still was somewhat larger in caliber.

Q. That sounds somewhat like sales argument, "lighter and stronger".

A. It was a very good one, too.

Q. What sort of an edge did it have?

A. The edge was a partially closed edge.

Q. It was not a completely closed edge?

A. No, sir, some of the core of the board was visible.

2676 Q. Where did the National people produce board at that time?

A. When I entered their employ, they were manufacturing board at Clarence Center, New York, and at National City, Michigan.

Q. They had two board mills?

A. Yes, sir.

Q. Could you tell us as to competitive conditions in 1928, and early 1929, in the industry?

A. Well, of course, that is going back a long ways, but I know that competition within the gypsum industry has always been very keen, and I don't imagine it was any keener then than it is today, although I am not in it today.

Q. Can you give us an idea of the price competition in 1928 and 1929?

A. Well, naturally, it would be difficult for me to place my finger on prices existing at that time, because to the best of my knowledge there was quite a fluctuation in prices from the time that I went into the industry until the time I left the industry.

Q. Is that strictly accurate? Are you familiar with the license agreements?

A. I am familiar with the license agreements only as having heard such a thing referred to.

Q. It is of record here that the license agreements were signed in May and October, 1929. Could you state 2677 whether there was a wide fluctuation of prices after those dates?

A. I don't think that there has been, or that there was as wide a variance after those dates, and my knowledge before those dates is limited to the time that I started in the industry, which was shortly before those dates.

Q. But you would say that competition, whether price competition or otherwise, was very active all through your connection with the industry?

A. Yes, sir. I had no price competition on boards operating under what is referred to as the license agreement.

Q. That is, in fact, that you had a uniform price after 1929?

A. Well, we had a published price from which we in the Central Division of the National Gypsum Company did not deviate.

Q. And did your competitors use the same price?

A. Well, to the best of my knowledge, because I did not see their price lists and we knew that we were getting business from our dealers, so we naturally had to assume that we were getting it on a competitive basis.

Q. And by "competitive basis", you mean what?

A. The same price.

Q. The same price, and competing on a level of superiority of product or on service or what?

A. On service, superior product.

2678 Q. Friendship?

A. The personal acquaintance of the individual in the territory.

Q. During this period following 1929, did you hear of the Board Survey Company?

A. I have heard the words "Board Survey" referred to, and in some correspondence it has been mentioned to me, that is, company correspondence.

Q. Did you ever see or hear of representatives of Board Survey being in your territory?

A. I heard that they had been in my territory, but I have never met anyone that was connected with the Board Survey.

Q. Now, from—

Mr. BROMLEY (interposing). Just a moment. I move the Court that that part of the answer as to what he heard be stricken, on the ground it is hearsay.

Mr. STEFFEN. It is more or less immaterial, but it is simply an indication as to what he knows as a sales manager concerning competitive conditions and the regulation of prices. It would normally be hearsay except that it is a matter obtained in ordinary business channels.

Justice STEPHENS. I think the Court is bound to strike it. If it is hearsay, it is incompetent. The motion is granted.

2679

By Mr. STEFFEN.

Q. Could you state of your own knowledge, Mr. Higgins, that representatives of Board Survey had talked with your dealers, investigating cases?

A. In one instance my dealers, one of my dealers, or one of the dealers in my area, had been approached by someone checking a supposed deviation that we had made from the published price of board.

Q. Now I want to take up—

Mr. BROMLEY (interposing). Just a moment. May I ask the witness whether it isn't the fact that everything he has just said was the result of what somebody told him?

Mr. STEFFEN. We are not asking for the conversation, Your Honor, and if it were what somebody told him it would not be objectionable.

Mr. BROMLEY. It would be hearsay. That is why it is objectionable.

Mr. STEFFEN. It would be hearsay only if we asked for the conversation. We are asking whether or not he knew that his dealers had been approached, and he said he did.

Mr. BROMLEY. He now says all that he knows is what he was told.

Justice STEPHENS. We have to receive evidence from the knowledge of witnesses. If his statements are based on what he was told by someone else, then, though he  
2680 doesn't phrase his answers in the form of hearsay, they are hearsay, because the person who actually knows isn't on the witness stand for cross-examination under oath.

Answer Mr. Bromley's question, Mr. Higgins.

The WITNESS. Would you state it again, Mr. Bromley, please?

Mr. BROMLEY. Everything that you have just told Mr. Steffen in your answer is based upon something that somebody told you?

The WITNESS. That is true.

Justice STEPHENS. Is there a motion to strike that answer?

Mr. BROMLEY. Yes, Your Honor, I move to strike it.

Justice STEPHENS. The Court will have to strike the answer. If you want to call the dealer or the person who interviewed the dealer to testify on his own knowledge, all right. But the foundation of the hearsay rule is elementary, and it seems not necessary to repeat it, it is that when a fact is to be testified to, it must be testified to under oath by a person on the witness stand, subject to examination, who has himself knowledge of it.

By Mr. STEFFEN.

Q. What dealer did you refer to, Mr. Higgins?

A. Dwight Hinckley Lumber Company, Cleveland, Ohio.

Q. I will come to the Dwight Hinckley Lumber  
2681 Company again in a minute or two.

During this period from September, 1928, when you came with National, to May, or the summer of 1929, did the National Gypsum Company sell to jobbers in your territory?

A. When I first started with National Gypsum Company, we were selling, to the best of my knowledge, one jobber in the area that I was covering.

Q. What was the name of that jobber?

A. The Toledo Plaster & Supply Company.

Q. And did you at any time discontinue selling that jobber?



A. We discontinued selling the Toledo Plaster & Supply Company some time after I became Central Sales Manager.

Q. And could you give us an idea of the time?

A. That is still going back quite a ways. I would say somewhere around 1930. It was about a year or so after I started with the company.

Q. And do you know why you discontinued selling to the Toledo Plaster & Supply Company?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Justice JACKSON. He can answer that yes or no.

Justice STEPHENS. Technically, that particular question can be answered yes or no.

The WITNESS. Yes.

2682

By Mr. STEFFEN.

Q. Will you state why?

Mr. BROMLEY. Objected to as incompetent because calling for a conclusion.

Justice STEPHENS. No, that is overruled. We can't tell, at least, until we hear the answer. It may be relevant. It may have to do with the charge in the complaint with respect to the alleged elimination of jobbers. The objection is overruled.

The WITNESS. I would say that the best answer that I could make to that question would be the fact that the Toledo Plaster & Supply Company, who continued to buy materials from the National Gypsum Company after that date, could no longer buy as a jobber because their jobber price and their dealer price were one and the same.

By Mr. STEFFEN.

Q. Did you talk with Mr. Burley or Mr. Baker about this matter?

A. My contact, field contact and my contact with the general office, was with Mr. Burley.

Q. And were you occasionally in Buffalo, or did you write to him only?

A. I would say that until I moved to Buffalo, I was in the Buffalo office at least once a month.

Q. And do you recall having talked with Mr. Burley on one of those visits to Buffalo concerning the Toledo account?

2683 A. I do not recall any specific conversation, but being an account of importance, necessarily there was some discussion. I couldn't say what the discussion was, other

than the fact that they were very unhappy about the fact that they could not buy profitably as a jobber.

Q. You are speaking of the "Toledo Plaster & Supply Company" being unhappy?

A. Yes, sir.

Q. Who did you talk with there, if anyone?

A. Harry Hanson.

Justice STEPHENS. Clear my mind. Who is this Mr. Burley that is referred to?

The WITNESS. He was Vice President in Charge of Sales of the National Gypsum Company.

Mr. BROMLEY. I would like to move to strike out so much of his answer as refers to the fact that the Toledo people were unhappy about the situation, on the ground that it is a mere conclusion.

Mr. STEFFEN. Well, Your Honor, I should say that that certainly is not hearsay, and if the man who is dealing with an account, and has over a period of time dealt with an account, can't state that the account was unhappy that it had been stricken off the list as a jobber, I shouldn't think any of this would be admissible.

2684 Justice STEPHENS. The objection is overruled.

By Mr. STEFFEN.

Q. Now on your trips to Buffalo, concerning which you just testified, you say you spoke to Mr. Burley. Did you ever talk with Mr. Baker at about this time concerning the Toledo Plaster & Supply Company?

A. No, sir, I do not recall any conversation with Mr. Baker.

Justice STEPHENS. Judge Garrett tells me that the matter before the Court was not an objection, but a motion to strike. Therefore, the motion to strike is denied.

That relates to the motion made by Mr. Bromley to strike the witness' statement that the Toledo account was unhappy.

Mr. STEFFEN. May I have the last question, please?

(The last question and answer were read by the reporter.)

By Mr. STEFFEN.

Q. You say you talked with Mr. Burley, Mr. Higgins. Can you tell us what, if anything, you told Mr. Burley concerning the Toledo account, the Toledo Plaster & Supply Company account?

A. That is why I qualified my last answer, that Mr. Bromley took objection to, for the simple reason that I

don't think that I could remember at this time any  
2685 specific conversation that I had with Mr. Burley.

Q. Could you remember broadly whether you ever discussed the Toledo account with Mr. Burley?

A. Yes, sir.

Q. And can you remember anything that Mr. Burley told you in connection with that account?

A. Well, naturally, as a field man, my interest was in keeping as large a volume as possible, and not knowing and not being able to recognize this so-called license agreement if I saw it walking down the street, I didn't know whether it was just something that was temporary or something that we could cut corners on, or what we could do to keep Toledo Plaster as an important account, because the loss of that volume in my division, of course, affected my sales cost, and naturally I had conversations with Mr. Burley to see if we could not go back to the old order of things. But the details of those conversations I couldn't remember.

Q. Did he ever tell you that you could go back?

A. No, sir, he said that it was very emphatic, and that there was absolutely no basis on which Toledo Plaster could be sold except as a dealer.

Q. Now do you recall, Mr. Higgins, any other jobbers who were operating about this period, in 1928 and 1929, in the gypsum industry?

A. That would be hearsay, because my knowl-  
2686 edge was limited to the Central area, and there was only one other jobber that I knew of in the Cleveland market, and that was the Teachout Company.

Q. And they were a jobber in that market?

A. They were a jobber on wallboards, which was somewhat different from the Toledo Plaster, who also were jobbing on plaster and gypsum boards.

Q. Could you say of your own knowledge that the Teachout Company is still selling, as a jobber, gypsum wallboard?

A. At my last contact with the market, which was 6½ years ago, I would say they were not.

Q. Did you know of the Abbey Company?

A. Only by name.

Q. Do you know where they are located, and whether they are jobbers?

A. They are located in New York City.

Q. Do you know whether they were jobbers?

A. I do not know whether they were jobbers of gypsum products. My contact and knowledge of their business was as to other products.

Q. Did you know of a company called Winslow & Company, in Portland, Maine?

A. I have heard of them, but never had contact with them except on other commodities.

2687 Q. Do you know whether they were jobbers of gypsum products?

A. I do not know whether they ever were.

Justice STEPHENS. The Court will take its usual morning recess at this time, for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2688 Justice STEPHENS. Proceed, gentlemen.

Mr. BROMLEY. May it please the Court, because I am in some doubt about the state of the record, I should like to have it appear, if your Honors are willing, that all of the defendants may have the usual objection as not binding upon them in the absence of proof of a conspiracy, to testimony by this witness and other witnesses as to conversations with other persons, without the necessity of a specific objection in each case.

Justice STEPHENS. That may be shown. The evidence is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. STEFFEN.

Q. I want to mention one other company, Mr. Higgins. Did you know the Oakfield Gypsum Products Corporation as a jobber?

A. Did I know them with my company as being a jobber?

Q. Yes.

A. Yes, sir.

Q. What connection did you have with the Oakfield Gypsum Products Corporation, if any?

A. For a short time we jobbed—

Q. (Interposing.) Just a moment, when you speak of your company, do you mean National?

A. No, I mean the Quality Materials Company.

Q. Well, let's take that up a little later. What I  
2689 wanted to find out was whether during this period in 1928 and 1929 the Oakfield Products Corporation, the Oakfield Gypsum Products Corporation, was a jobber at that time of gypsum products?

A. I am sorry I misunderstood you. I had no knowledge or acquaintance with the Oakfield Gypsum Products during that time.

Q. They were not in your territory?

A. No, sir.



Q. Did you know of the Fairmont Wall Plaster Company?

A. I do know the factors connected with the Fairmont Wall Plaster Company.

Q. What do you mean by "factors"?

A. The men who owned the company, Mr. Black and Mr. Spies.

Q. Was the Fairmont Wall Plaster Company a jobber during the period from 1928 to 1929, to your knowledge?

A. That would be hearsay. I did not sell them as a jobber, but I understood they were jobbers.

Mr. BROMLEY. I move that that part of the answer beginning with "but I understood" be stricken as a conclusion.

Mr. STEFFEN. Your Honor, he is testifying concerning his knowledge of the industry and of the business, and he is not testifying concerning a conversation. Mr. Higgins or Mr. Bromley cannot say anything of their own knowledge, practically, they have to rely on reports and upon 2690 trade information. If we were endeavoring to prove a conversation, that would be entirely different.

Justice STEPHENS. This seems to be a critical issue in the case—

Mr. STEFFEN (interposing). It is not a critical issue, if I may say so, it is rather an immaterial one as respects the Fairmont Wall Plaster Company.

Justice STEPHENS. Isn't the issue as to whether or not jobbers were eliminated a critical issue in the case?

Mr. STEFFEN. I think that is admitted.

Mr. BROMLEY. Wait a minute, it is admitted that the United States Gypsum Company as licensor under its license, in 1930 levelled off the price at which its licensees could sell jobbers so far as patented board was concerned, the situation prior to that time being that the licensor permitted its licensees to sell patented board to jobbers at a discount. Then, in 1930, in the exercise of their right, as we believe, as the owner of the patents, they set the price at which their licensees could sell to jobbers at the same figure at which the licensees were permitted to sell dealers. Now that is all we admit.

The Government contends that that eliminated jobbers because, it says, it was an economic result that a jobber couldn't stay in business if he couldn't get a discount. We don't admit that.

2691 Mr. STEFFEN. You don't admit that a jobber cannot stay in business if he cannot get a discount?

Mr. BROMLEY. Certainly not. There have been jobbers ever since, and there are plenty of jobbers in the business because they render a service to the dealers, because they make readily available and quickly available odd-lot supplies of board and other materials when the dealers who want such products cannot afford to buy carload lots. Those jobbers have always been in business, they can stay in business, they charge a slight premium over the dealer price in return for the jobbing service which they render to the dealers whom they serve. There have always been jobbers since this price change in 1930, and there always will be, in the board field.

Justice STEPHENS. Read the question and answer.

(Thereupon, the last question and answer were read by the reporter.)

Justice STEPHENS. The Court does not rule, of course, Mr. Steffen, that you cannot put a witness on who, being thoroughly familiar with trade information may not make statements on the basis of trade information. That, of course, is customarily done by all of us, as you suggest. But here is a charge that jobbers were eliminated as a result of the license practices of the company. Whether or not a man was a jobber, and whether or not he was eliminated, are strict issues of fact, and interpretation of fact, in the case. If we permit this witness to 2692 testify that he understood someone was a jobber, and that is in the record as establishing that he was a jobber, there is no basis for cross-examination. This witness admits he doesn't know. It seems to us a clear violation of the hearsay rule and the motion is granted.

Mr. STEFFEN. Will Mr. Bromley admit that the Fairmont Wall Plaster Company was a jobber?

Mr. BROMLEY. No, because I don't know.

By Mr. STEFFEN.

Q. What was the basis of your information, if any, Mr. Higgins, in your reply that you understood that the Fairmont Wall Plaster Company was a jobber? You stated that it was hearsay, and I think that that is a matter for the Court to determine, whether it is hearsay.

A. Well, it was was hearsay based on discussions with the individuals, both Mr. Black and Mr. Spies—if that is hearsay—but I have never seen any invoices where they had been billed as jobbers. All I had was a verbal discussion with Mr. Spies and Mr. Black.

Q. And would you say that it was general trade information that they were jobbers, or that they were not?

Mr. BROMLEY. That is just another way of getting at the same result. I object to it as incompetent.

Justice STEPHENS. Isn't there any other way of proving or finding out whether these people were jobbers?

2693 Mr. STEFFEN. Certainly, we are going to put on Mr. Spies as a witness, and there is no question about it; and I would suspect that Mr. Bromley knows about it in the way we know most things. Of course he has never been in there and looked over their books, I don't suppose.

Justice STEPHENS. Let's not have personalities. If the objection is insisted upon it is sustained.

Mr. BROMLEY. All I can say is that after six and a half weeks, Judge Goldsborough said he didn't know what a jobber was, and I am likewise in the same situation.

Justice STEPHENS. Well, let's prove this by Mr. Spies. He ought to know, if he is available. Proceed with another subject with this witness.

By Mr. STEFFEN.

Q. Mr. Bromley says he doesn't know what a jobber is, Mr. Higgins. Will you give us your general notion of the term "jobber" when you use it? I would like to have the broad term defined and any qualifications or any discussion you have on what is a jobber.

A. Well, from a facetious standpoint, a jobber is the lowest form of animal life. (Laughter.)

But the terms "wholesaler", "jobber", and "distributor" have been footballed and kicked around, and they vary with different industries.

Q. Let's stay with the gypsum industry for a bit.

2694 A. Of course there are no jobbers in the gypsum industry. But a jobber is—and we are jobbers, we buy materials from manufacturers and sell to dealers, and bill those dealers, and carry our accounts and pay the manufacturer. So that we buy the material and we sell it, and pay the manufacturer.

Justice STEPHENS. What is the difference, if any, between a jobber and a wholesaler?

The WITNESS. Well, a wholesaler is a misnomer because, for instance, this Dwight Hinckley Lumber Company is both a wholesaler and a retailer. They sell to other dealers in carload lots. In other words, that is a wholesale transaction.

By Mr. STEFFEN.

Q. That would be a jobber transaction, would you say?

A. Yes, sir. Then they sell to dealers who pick up at their warehouse, and that is a warehouse operation, but they also sell retailers.

Justice STEPHENS. You say the word "wholesaler" is a misnomer because some of them sell to retailers. Whom would they sell to if not to retailers?

The WITNESS. Well, they could sell to jobbers. That is why, your Honor, the term "jobber" is a misnomer because—

Mr. STEFFEN (interposing). You mean the term "wholesaler" is a misnomer?

The WITNESS. Yes—the term is limited within the confines of the commodity that is in question.

2695 For instance, a distributor, say, for General Motors Products, could have the State of Ohio as a distributor, and sell jobbers in Cleveland and Cincinnati. So that your jobber would then be a local factor. But it depends on the industry or the commodity that is in question; and in the building materials industry there are so many different divisions that it is difficult to define the function of a jobber.

Justice STEPHENS. The Court as presently advised will adopt the remarks of Judge Goldsborough. (Laughter.)

The WITNESS. I might say this, that a jobber is sometimes created during a period of stress or when some manufacturer needs additional volume, he will take a large retail outlet and make him a jobber. That sometimes is temporary. So that the term "jobber" is not only limited to the commodity, but it is limited to the economic cycle.

Justice STEPHENS. Well, there is a chain of middlemen, so to speak, between the manufacturer and the ultimate consumer?

The WITNESS. Yes.

Justice STEPHENS. One of the ultimate consumers is the retailer in ordinary business merchandising; but if you talk in terms of a simple item like stoves, for example, the ultimate consumer is the homeowner who buys the stove. Then next is the retailer who retails that stove to him, and between the retailer and the manufacturer you itemize both the wholesaler and jobber?

2696 The WITNESS. Yes.

Justice STEPHENS. Could you, just laying aside the gypsum industry and talking as an experienced businessman, tell us what is the difference between a wholesaler and a jobber?



The WITNESS. The difference between a wholesaler and a jobber—the best way that I can describe it would be, assuming that you owned a stove plant (you mentioned stoves as a commodity), it is not economic for you to have contact, as a manufacturer, with too many field men. You therefore—

Justice JACKSON (interposing). Who would be the field men, the dealers?

The WITNESS. No, sir, the wholesalers or jobbers, let's say the jobbers.

But you would assign the State of Ohio to John Doe, and the State of Pennsylvania to Jim Brown, and so forth, so that you would be cutting down the necessity for you listening to all of the little detailed complaints that come in, or the field problems. You are assigning a responsibility to that wholesaler to save you the trouble of organizing too much check-up yourself. Then he, in turn, appoints his jobbers. He doesn't sell anything direct himself, except to a jobber. He is called either a wholesaler or a distributor.

Justice STEPHENS. In other words, a jobber is an intermediary between the wholesaler and the retailer?

The WITNESS. In a number of commodities, yes, sir.

2697

By Mr. STEFFEN.

Q. He may be an intermediary directly between the manufacturer and the dealer?

A. That is right, sir.

Mr. STEFFEN. If that is perfectly clear to the Court, I will proceed. (Laughter.)

Justice STEPHENS. It was until you asked the last question, Mr. Steffen, but that restored it to its former status. (Laughter.)

By Mr. STEFFEN.

Q. Well, Mr. Higgins, let's explain it in terms of your business. You started business in about what year, did you say?

A. The fall of 1937.

Q. And where are you located?

A. Buffalo, New York.

Q. What lines do you carry?

A. A full line of clay products, which means sewer pipe, flue lining, face brick, building tile, drain tile, lime products, insulation boards and rock wool; also metal products.

Q. Do you carry metal lath?

A. No, sir. By "metal products" I mean fireplace equipment and ash dump doors, and things like that. I guess that covers it.

Q. You omitted both plaster and plaster board.

A. We do not job plaster or plaster board.

2698 Q. I want to ask you this question—to whom do you sell?

A. We sell to dealers only, building material and lumber dealers.

Q. And I want now to have you tell the Court what line—

Justice JACKSON (interposing). May I interject a question?

Mr. STEFFEN. Certainly.

Justice JACKSON. And they, in turn, sell to contractors?

The WITNESS. That is right.

Mr. STEFFEN. I think that is the sequence.

By Mr. STEFFEN.

Q. What line or lines of products do your dealers ordinarily carry?

A. All dealers carry—and when I say "all dealers" I mean ninety per cent of our dealers—they carry everything that we handle.

Q. And do they sell additional products?

A. Yes, sir.

Q. For example?

A. Well, gypsum products and cement.

Q. And whom do they service, or whom do they sell to?

A. They sell to the contractor.

Q. And the contractor is engaged in what business?

2699 A. He is engaged in building either for himself or for someone that gives him a contract to build for them.

Q. So that you could use the phrase "general builders' supplies"?

A. Yes, sir.

Q. Did you ever sell either plaster or gypsum board in your company, or rather did your company ever sell gypsum board or plaster?

A. The Quality Materials Company?

Q. That is right.

A. Well, we sell through our Detroit yard—

Q. (Interposing.) No, let's start at the beginning, please, and we will come to the Detroit yard later.

A. We have sold gypsum wall plaster as a jobber.

Q. What was your source of supply?

A. The Oakfield Gypsum Products Corporation.

Q. Did you ever buy from Ebsary?

A. No, sir.

Q. Do you recall how long you bought from the Oakfield Gypsum Products Corporation?

A. To the best of my knowledge, from three to four months.

Q. And did you buy both plaster and board from the Oakfield Products Corporation, or merely plaster?

A. Just plaster, sir.

Q. Did you attempt to buy board from the Oak-  
2700 field Gypsum Products Corporation?

A. No, sir.

Q. What period was this when you were dealing with the Oakfield Gypsum Products Corporation?

A. I would say from about the first of January, 1938, to about April, 1938. It might have been thirty days one way or the other, but I think that is pretty close.

Q. I want to show you Government's Exhibit No. 336 for identification, which purports to be an invoice of the Oakfield Gypsum Products Corporation to the Quality Materials Company under date of May 21, 1938.

Mr. STEFFEN. That is out of order, your Honor, but this examination is somewhat out of order.

Justice STEPHENS. That is the third from the last document in this set, apparently?

Mr. STEFFEN. That is right.

Justice STEPHENS. What number is that, Mrs. Gillette?

Mrs. GILLETTE. 336.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. Do you recognize Government's Exhibit No. 336 for identification, Mr. Higgins?

A. Yes, sir.

Q. Will you tell the Court what it is?

A. That is an invoice to the Quality Materials  
2701 Company from the Oakfield Gypsum Products Corporation, on a shipment made to the City Material & Coal Company at Cleveland, Ohio, for ten tons of Oakleaf neat plaster.

Q. That, "less 15% commission" would be your commission on the plaster.

A. Yes, sir.

Q. And that shipment went directly from Oakfield Gypsum to the City Material & Coal Company in Cleveland?

A. Yes, sir.

Q. Now what is meant by this language, "board billed direct to City Material & Coal Co. and freight deducted from their invoice"?

A. Ten tons of gypsum plaster is a half carload, which it is not economic to ship. The balance of the car was filled out with gypsum lath.

Q. And how was that billed, if you can tell the Court?..

A. The Oakfield Gypsum Products Corporation billed the City Material & Coal Company for it.

Q. Who sold the order—if it was sold—to the City Material & Coal Company?

A. The Quality Materials Company.

Q. Why was that arrangement entered into in that way?

Mr. BROMLEY. I object to that as calling for a conclusion.

Mr. STEFFEN. I think it is one that he can prop-  
2702 erly give, your Honor.

Justice STEPHENS. It is explanatory of the method of doing business. The objection is overruled.

The WITNESS. May I have the question, please?

By Mr. STEFFEN.

Q. Why was this transaction entered into in this way?

A. The City Material & Coal Company, taking on a new brand of plaster unknown to the Cleveland market, were reluctant to take a full or twenty-ton car, and agreed to take a half car, and would fill the balance of the car with gypsum lath.

Justice STEPHENS. Which they also purchased from you?

The WITNESS. We accepted the order.

By Mr. STEFFEN.

Q. Who sold the order?

A. We did not sell the gypsum lath, that is we contacted the dealer and filled the car out with gypsum lath, and we refused to bill any product on which we did not have a profit.

Q. Why wouldn't you have a profit on this, I am not quite clear, Mr. Higgins?

A. Well, our price was the same as the dealer price.

Q. That is, you tried to buy board from the Oakfield Gypsum Products Corporation?

A. Well, I didn't try very hard.

Q. Why not?

2703 A. Because I knew, after my experience in the gypsum industry, that I could not buy it and resell it in carload lots at a profit.

Q. Why not?



A. Because my price would be the same as the dealer price.

Q. That is, you would have to ship and pay the freight and still only get the same price as the dealer?

A. Well, the freight would be absorbed by the dealer, of course, but I would be out my overhead expense in connection with the transaction.

Q. Was it possible for you to buy from the Oakfield Gypsum Products Corporation at any discount from the dealer price?

A. Gypsum wallboard?

Q. Yes.

A. No, sir.

Q. And therefore, I understand, you resorted to this way of filling a car in order to make it an economic shipment?

A. That is right, sir.

Q. Now, how long did you continue jobbing plaster for the Oakfield people, do you remember, or does this refresh your recollection?

A. It is purely a guess when I say three or four months.

Q. I want to show you Government's Exhibits 337 and 338 for identification, the first being a document 2704 from the Oakfield Gypsum Products Corporation reciting a sale to Thomas Cox Company, Inc., under date of June 16, 1938, and the second one being a similar writing under date of June 20, 1938. Can you identify Government Exhibits 337 and 338, Mr. Higgins?

A. Yes, sir.

Q. What are they, please?

A. 337 is an acknowledgment of an order for a truck-load of gypsum lath and wallboard to the Thomas Cox Company, Inc., Niagara Falls, New York.

Q. And are you familiar with that order?

A. I remember that we did receive the order.

Q. What do you mean by "we" received the order?

A. In our Buffalo office.

Q. And what became of the order?

A. We transmitted the order to the Oakfield Gypsum Products Corporation who, in turn, shipped the material and billed it direct to the Thomas Cox Company.

Justice STEPHENS. By "we" you mean the Quality Materials Company? When you said "we" received the order in the Buffalo office, you meant the Quality Materials Company?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. And did your company receive a jobber's profit on that order?

A. No, sir.

2705 Q. What became of the Oakfield Gypsum Products Corporation; did they continue in business?

A. I don't know how to answer that.

Justice STEPHENS. Well, do you know?

The WITNESS. I don't know, sir, other than by hearsay.

Justice STEPHENS. If you don't know what became of them, just say so. You don't have to answer questions that you cannot answer.

Mr. STEFFEN. I would suggest to the Court that Mr. Higgins should not apply the hearsay rule, that he should state what he knows.

Justice STEPHENS. That is true. You must leave it to us to determine whether or not the matter is hearsay. You are expected to respond to the questions asked and if the questions or answers are thought to be improper, the opposing side will have an opportunity to object, and then we will determine whether it is hearsay or not. But nevertheless, we do not want you to feel restricted and ill at ease. If you think you cannot answer a question as asked, just frankly say so.

By Mr. STEFFEN.

Q. The general understanding in the trade is that the Oakfield people were bought out by National, isn't that so?

A. That is right, sir.

Q. And did you try to make any other connection to buy board on a jobber's commission after you had these  
2706 transactions with the Oakfield people?

A. No, sir.

Q. Have you ever talked with either Mr. Baker or Mr. Burley in regard to the possibility of buying board?

A. I will withdraw that statement I just made. We purchased plaster products from the Grand Rapids—not the Grand Rapids Plaster Company, I am sorry—what is the name of that gypsum company in Grand Rapids? There are two plants, and I can't think of the name of this other plant—I have it, Alabastine.

Q. You did what?

A. We did purchase some plaster from Alabastine at Grand Rapids after we had done business with the Oakfield Gypsum Products people. That was some two or three years later.

Q. My question was directed largely to board. Did you attempt to get a board connection on a jobber basis?

A. No, sir.

Q. And why not?

A. Well, having been in the industry for a period of nine years, I knew that I could not buy board and resell it at a profit as a jobber.

Q. What is your present territory? I mean what territory does the Quality Materials Company service?

A. We have shipped into every State east of the Mississippi River with the exception of Louisiana, Mississippi and Alabama.

Q. And you shipped into those States the various materials that you have told us about?

A. Yes, sir.

Q. Will you tell the Court whether you consider that a jobber serves an economic function in selling products under those circumstances?

A. Yes, sir.

Mr. BROMLEY. I object to that as immaterial and incompetent, and move to strike the answer.

Mr. STEFFEN. I would like, inasmuch as there is an uncertainty here as to who are jobbers and as to what their position is, to have the witness state very briefly—it will just take a moment or two—what he regards the economic function of a jobber to be.

Justice STEPHENS. Well, if you want to ask the witness what a jobber does in the business world, that is one thing, but if you want to ask this witness to state whether or not in his opinion a jobber discharges an economic function in the technical sense in which an economist would describe that, I think that is entirely different.

Mr. STEFFEN. I didn't want to ask that at all. I wanted to ask what function a jobber performed as a business matter.

Justice STEPHENS. You may answer that.

Mr. BROMLEY. Is it now understood that this is confined to the gypsum industry?

Mr. STEFFEN. No, this is just generally, because jobbers have been eliminated from the gypsum industry, we contend. I want to find out what the jobber function is.

Justice STEPHENS. In view of the previous experiment on this subject, I am not certain we will get anywhere, but you can try again.

Mr. STEFFEN. Thank you.

Justice STEPHENS. I don't say that in disrespect to the witness at all. I realize, Mr. Higgins, that there are overlapping relationships and overlapping functions between wholesalers and jobbers, and it is very difficult to give a precise definition, and I know that you are trying the best you can to help us out.

Tell us in your own way what a jobber does, what his business job is.

The WITNESS. Well, suppose, instead of taking that high-dive off of that jobber description board again, that I limit my statement to our own business.

By Mr. STEFFEN.

Q. All right.

A. We serve a very definite function in contacting, over a wide area, for smaller manufacturers who are not in a position to maintain a sales forces that could efficiently cover the area that would give them what we term  
2709 healthy distribution. We are capable of doing that, based strictly on the fact that we carry a varied line of commodities that are considered volume commodities in different industries. That allows us to travel men across the country and to police the situation, and in addition to giving healthy distribution, relieve the small manufacturer of credit risks and responsibilities, and just let him continue his function of manufacturing.

Justice STEPHENS. Let's put it this way, if I may perhaps try to help a little here. Let's use first the general term "distributor" as a broad term which covers both jobbers and wholesalers. Isn't this what you are trying to tell us—that a manufacturer, as a matter of business convenience, limits his contact to that kind of a distributor that we generally speak of as a wholesaler, who buys in very large quantities, but who himself does not have an immediate contact with the dealer, ordinarily? This wholesaler has himself a contact with a group of other distributors known as jobbers, and they do have a direct contact with the dealers. So you are an intermediary, aren't you, between the wholesaler as you have described him, and the dealer?

The WITNESS. No, sir, we go direct from the manufacturer to the dealer.

Justice STEPHENS. You don't buy from the wholesaler?

The WITNESS. No, sir, all of our contacts are direct manufacturer contacts.  
2710

Justice JACKSON. And you are a jobber, you call yourself a jobber?



The WITNESS. Yes, sir.

Mr. STEFFEN. And you don't sell to contractors?

The WITNESS. No, sir.

Justice STEPHENS. How are you different from a wholesaler, then?

The WITNESS. Please! (Laughter.)

By Mr. STEFFEN.

Q. Let me get at this question, Mr. Higgins. Is the jobber as necessary to a large company as he would be to a small company?

A. A jobber to a large company would probably embarrass field sales efforts.

Q. Would that apply, for example, to a company like United States Gypsum Company?

A. I would say so.

Q. Do they have a very large line of products?

A. They have a very complete line of products.

Q. In the case of a small company, a one-plant company, making only one product, as for example, the Ebsary Gypsum Company, would, perhaps, a jobber be more necessary to that company?

A. Well, I am a jobber, but I wouldn't want to be a  
2711 jobber for Mr. Ebsary, even though I would like to be a gypsum jobber. (Laughter.)

Q. Well, I think that gets a little beyond the record, your Honor.

The point I wanted to make was that with a small one-plant operator, where he hasn't the opportunity to cover the entire country or to distribute his efforts, a jobber in your opinion, as I understand it, would be more important?

A. Well, we feel that we could sell a good volume of products for a single gypsum plant, yes, sir.

Q. Have you ever made an estimate of the increase or possible increase in business that you might get if you were able to job gypsum board and plaster?

A. No, sir, and probably one reason is that we have been so busy with our other products. All we know is that we would like to have gypsum and cement which are both items which are not jobbed.

Q. Can you give us an idea of the general size of your business, Mr. Higgins?

A. We did, last year, about \$1,115,000, worth of business.

Justice STEPHENS. That is gross sales?

The WITNESS. Yes, sir, after freights and discounts.

By Mr. STEFFEN.

Q. Now I would like to go back to Mr. Dwight  
2712 Hinckley. Who was Dwight Hinckley?

A. Dwight Hinckley is a lumber wholesaler with headquarters in Cincinnati, Ohio, who maintains and operates wholesale pick-up yards and solicits carload business on lumber from lumber dealers, and maintains yards in Cincinnati, Detroit and Cleveland.

Q. And was there a complaint against the Dwight Hinckley people, or rather against the National Gypsum Company, back in 1932, do you recall, concerning Dwight Hinckley?

A. I don't understand the meaning of the word "complaint".

Q. Let me show you Government's Exhibit 339 for identification.

Mr. STEFFEN: This is the second item in your folders, your Honors.

By Mr. STEFFEN.

Q. This purports to be a letter from Board Survey Company, addressed to the National Gypsum Company under date of May 17, 1932.

I will ask you to read that, Mr. Higgins, and then I will ask you a question or two.

(Witness examines document.)

Can you identify Government's Exhibit 339 by the writing or in any other way, Mr. Higgins?

A. I can identify the reference to the Dwight Hinckley Lumber Company.

2713 Q. Are you familiar with the handwriting at the foot of the exhibit?

A. I wouldn't say that I was familiar with any handwriting, sir.

Q. Who would the initials "E.B.B." refer to, if you know? Was there anyone connected with National having those initials?

A. There was one man with whom I had correspondence who had those initials.

Q. Who was that?

A. His name was Mr. Biesinger.

Q. What was his position?

A. I don't know that he ever had any official title, I never heard of it, sir. He was an employee.

Q. Was he connected with the National Gypsum Company?

A. Yes, sir.

Q. You state that you are familiar with the transaction referred to in the letter, is that correct?

A. I stated that I was familiar with the name referred to, sir.

Q. With the name referred to?

A. Yes, sir, and the fact that there had been some discussion with Dwight Hinckley in reference to price conditions in the market.

Q. And would you regard this as a complaint from the Board Survey Company addressed to the National Gypsum Company in regard to those matters?

A. I would say, after reading it, that it would be, sir.

Q. Now I want to show you Government's Exhibit No. 340, which purports to be a memorandum from Mr. Burley to you under date of May 25, 1932, and ask to have you read that, please.

Justice STEPHENS. I suppose the letters, "ECL" mean "less than carload lot", do they not?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. Can you identify Government's Exhibit 340 for identification, Mr. Higgins, by anything about the memorandum?

A. I identify it as bearing my handwriting.

Q. Is that your signature, "Higgins"?

A. Yes, sir.

Mr. STEFFEN. Would the Court like the witness—perhaps not at this time—to explain what this handwriting says, or shall we bring that up later? Is it reasonably legible to the Court?

Justice STEPHENS. Oh, yes, we can read it on our copies.

Justice JACKSON. It is fine handwriting.

The WITNESS. Thank you, sir. (Laughter.)

Justice JACKSON. Compared to what we usually see from lawyers. (Laughter.)

The WITNESS. There is just too much of it, that is all.

By Mr. STEFFEN.

Q. I show you Government's Exhibit 341 for identification, which purports to be a memorandum from Mr. Burley to Mr. Higgins under date of May 25, 1932, and ask if you can identify the handwriting on that memorandum.

Justice STEPHENS. The Court will take its usual recess at this time, and it will be necessary today, I regret, to recess until two o'clock on account of another engagement which the Presiding Judge has.

Announce the recess.

(Thereupon, at 12:15 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

2716

## AFTERNOON SESSION.

(The trial was resumed at 2:00 o'clock p.m. pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, CHARLES A. HIGGINS, resumed the stand and testified further as follows:

## DIRECT EXAMINATION (RESUMED)

By Mr. STEFFEN.

Q. I believe when we recessed, Mr. Higgins, you were looking at Government's Exhibit 341 for Identification, but had not yet identified it.

I would like to have you examine it again and state whether or not that is your handwriting on the foot of the exhibit?

A. Yes, sir, it is.

Q. Can you state to the Court what the nature of the complaint was against National as respects the Dwight Hinckley account?

Mr. BROMLEY. Whose complaint, may we have that, please?

Mr. STEFFEN. We have identified Government's Exhibit 339, and that purports, as the witness testified, to be a complaint by the Board Survey Company against National; and what I am asking is what the witness understands was the basis of that complaint as respects the  
2717 Dwight Hinckley account.

Justice STEPHENS. You may answer.

The WITNESS. The Dwight Hinckley Lumber Company was accused of selling plaster wallboard and gypsum lath below the dealer carload price.

Justice STEPHENS. Below what?

The WITNESS. The dealer carload price.

Justice STEPHENS. Thank you.

By Mr. STEFFEN.

Q. And who was that company selling to?

A. They were selling to dealers in Greater Cleveland.

Q. At less than the dealer carload price?



A. Yes, sir.

Q. Could you assign figures and give us an example of what that would mean?

A. The figures, as of today, would be strictly a guess.

Q. Just take an arbitrary figure, please.

A. I would say that the average delivered price of plaster wallboard in Cleveland at that time was around \$28 per thousand, delivered. That probably varied—

Q. (Interposing.) That is sufficient to give us an illustration. Gypsum lath—let's take that as an illustration?

A. The Dwight Hinckley Lumber Company, for a period of about 30 days, was selling at about \$1.50 per 2718 thousand below that price for delivery on dealers' trucks, picked up at Dwight Hinckley's warehouse.

Q. And why was there a complaint about that?

A. The complaint was that it appeared that the National Gypsum Company was giving the Dwight Hinckley Lumber Company a better price than the other dealers in the market.

Q. And that would be necessary in order to enable the Dwight Hinckley Company to sell at \$1.50 below the car-load delivered price?

A. I would say that that was the assumption, that it was apparent that he would have a better price to enable him to sell below what was the established or going dealer price.

Q. And that established or going dealer price was the USG bulletin price?

A. I don't know about that; it was the National Gypsum bulletin price, as I had received it from Buffalo.

Q. During that period?

A. Yes.

Q. And that was the uniform market price in that territory at that time?

A. Yes, sir.

Q. Now was that complaint investigated?

A. Someone called on Mr. I. C. Harris, who was manager of the Dwight Hinckley yard in Cleveland, and tried to—

2719 Justice STEPHENS (interposing). Manager of the Dwight Hinckley what in Cleveland?

The WITNESS. Lumber yard.

Mr. BROMLEY. Now you are telling what somebody told you, again, aren't you?

The WITNESS. Yes, sir.

Mr. BROMLEY. I object to it as incompetent.

Justice STEPHENS. Sustained.

Mr. BROMLEY. I move to strike out the answer.

Justice STEPHENS. That particular answer may go out.

By Mr. STEFFEN.

Q. Did you personally know who talked with Mr. Harris of the Dwight Hinckley Company?

A. Do I personally know who talked with him?

Q. That is right.

A. No, sir.

Q. Did you talk with Mr. Harris of the Dwight Hinckley Company concerning the matter?

A. Yes, sir.

Q. And what did you say to him?

A. I told him—

Mr. BROMLEY (interposing). I object to this as not binding on any defendant in this case, except possibly National.

Mr. STEFFEN. That is making the same objection that has been made before. What we are endeavoring to do is to find out what the basis of this complaint was, and what was done by National in connection with it.

Mr. FINCK. If the Court please, I object to it as not being binding on National. I don't see how it is binding on us any more than it would be on any other defendant.

Justice STEPHENS. Because it concerns National.

Mr. FINCK. I don't know that it does.

Justice STEPHENS. I understood that he said it does.

Mr. STEFFEN. Mr. Higgins was their sales manager in the field, and was responding to a request from Mr. Burley.

Mr. FINCK. It was not within his authority to tell Mr. Harris how to sell his goods. That is what he is talking about, Mr. Harris' sales, not National's sales. This question doesn't apply to sales by National. You asked if he talked to Mr. Harris about the sales that he made to consumers.

Justice STEPHENS. Who is Mr. Harris?

The WITNESS. He was the manager of the Dwight Hinckley Lumber Company, Cleveland yard, at that time.

Mr. STEFFEN. Let me get at it this way, Your Honor.

By Mr. STEFFEN.

Q. Did you investigate whether Mr. Harris or the Dwight Hinckley people were selling at \$1.50 below the carload delivered price?

A. Yes, sir.

2721 Q. And what did you find out?

A. We found out he was selling below the carload delivered price.

Q. And did you report that to Mr. Burley?

A. Yes, sir.

Q. What was the outcome of your report to Mr. Burley?

A. The outcome of my report to Mr. Burley—it was purely a standard report, because the solution of the problem was strictly up to the sales manager in the field.

Q. Yourself, you mean?

A. Yes, sir. I just passed along information as I found it, to Mr. Burley.

Q. And did you continue to sell to the Dwight Hinckley Company?

A. Could I qualify that?

Q. You may, certainly.

A. I had a discussion with Mr. Harris, and smoked out the fact that he was using plaster wallboard as a leader to sell some of his other products, and that he considered it within his right to sell plaster wallboard for any price that he saw fit. My contention was that I was not qualified to tell him at what price he was to sell his merchandise, but that when his sale of a branded article that I was selling reflected that he was supposedly getting a better price than the competitors in the market, that we would  
2722 refuse, I would refuse to sell him, for the simple reason that he represented one outlet as against about 30 or 40 outlets. We enjoyed a very nice board business in the Cleveland market, and it was a choice of the Dwight Hinckley account or the responsible accounts that we were selling in the market.

Q. And what did you do?

A. I told him that we would refuse to sell him.

Q. And you did refuse to sell him?

A. I refused to sell him, and he lowered his price still further until he had exhausted his inventory of Gold Bond boards.

Justice STEPHENS. Just a moment, please.

Justice JACKSON. You weren't sales manager of National, were you?

The WITNESS. I was Central Sales Manager for National, yes, sir.

Justice STEPHENS. I ask the question because I am puzzled, but perhaps this will clear it up—if this man was sales manager of National, you would think he would know whether National was selling at less than bulletin prices.

Mr. STEFFEN. Not that he would know, but he was checking up with the dealer to find out what the situation was, and also in order to make a report back.

By Mr. STEFFEN.

2723 Q. Did you report your findings back to National?  
A. Yes, sir.

Q. I now show you Government's Exhibit No. 342, which purports to be a copy of a letter written by Mr. Burley, Vice President of National, to Mr. C. Henning, Vice President of United States Gypsum Company, under date of May 28, 1932, in relation to Dwight Hinckley, Cleveland, and ask you to examine that.

(Witness examines document.)

Justice STEPHENS. Proceed.

By Mr. STEFFEN.

Q. Are you familiar with the subject matter of that letter, Mr. Higgins?

A. I recognize it as a possible statement on the Dwight Hinckley account, undoubtedly.

Q. You stated, I think, that you did report to Mr. Burley?

A. Yes, sir.

Q. Is that consistent with your report to Mr. Burley?

A. Yes, sir.

Q. He would normally have gotten his facts from you on that matter, would he?

A. Yes, sir.

Q. You never saw that before, or the original of that letter, I presume?

A. No, sir.

2724 Mr. STEFFEN. I will now offer in evidence Government's Exhibits Nos. 339, 340, 341, and 342. Exhibit 342, I think, is circumstantially identified as being a response to a matter—

Justice GARRETT (interposing). What about 336 and 337 and 338?

Mr. STEFFEN. I am coming back to those later. What we are now offering are the four items on the Dwight Hinckley matter, the first three of which have been identified, I believe; and the fourth, I think, is circumstantially identified.

I might say to Your Honors that at least 3 and I think 4 of these were introduced in evidence in the criminal trial, and at that time they were sufficiently identified for purposes of that trial. If I am incorrect in that, I would like to have Mr. Bromley state so.

Justice STEPHENS. This first item is not yet introduced, signed by M. H. Baker?



Mr. STEFFEN. No, we haven't talked about that at all, Your Honor.

Justice STEPHENS. The items you are introducing or offering are 339, the letter of May 17—

Mr. STEFFEN (interposing). That is right; and 340, the letter of May 25; and 341, the memorandum of May 25; and 342, which is the letter of May 28 in regard to 2725 the same matter.

Justice STEPHENS. Exhibit 340 is the letter of May 25, and 341 is another memorandum of the same date?

Mr. STEFFEN. That is right.

Justice STEPHENS. And 342 is the letter of May 28?

Mr. STEFFEN. That is right.

Justice STEPHENS. What is your position with respect to the identification of 342?

Mr. STEFFEN. That the subject matter has been identified by Mr. Higgins. The letter on its face purports to be a reply to claims made concerning the Dwight Hinckley account.

The first letter, 339, is a letter addressed to Mr. Baker of the National Gypsum Company, in regard to Dwight Hinckley, and talks about the same subject matter.

Mr. BROMLEY. Now, if Your Honor pleases, we object to the identification of 342, and I desire to point out that an inspection of it shows clearly that it is not a reply—

Mr. STEFFEN (interposing). It is not a reply to the exact letter, Your Honor, but it is a reply on the subject matter.

Mr. BROMLEY. You said it was a reply to Exhibit 339, which it plainly isn't.

Mr. STEFFEN. I did not say that.

Mr. BROMLEY. You have got the answer to Exhibit 339, which you haven't put in here, which you have skipped.

2726 We object to the identification of Exhibit 342. It did not come from our files, it has not been identified at all, and we know nothing about it.

Mr. STEFFEN. It came from the National Gypsum Company files, I believe.

Mr. FINCK. Well, even if it did, I would not stipulate its admission.

Mr. STEFFEN. You will agree that it did come from your files?

Mr. FINCK. Yes, it came from the office, we sent it in.

Mr. STEFFEN. The identification is that this is a business letter received from National Gypsum Company's files. The subject matter of the letter is connected closely with the transaction which is discussed in the three preceding

exhibits, 339, 340, and 341. It accords with the witness' statement of what he found upon investigation at the Dwight Hinckley Company, and what he reported to Mr. Burley.

Mr. BROMLEY. I would like to ask counsel if he won't admit that he has in his possession a letter which is the reply to Exhibit 339, dated May 24, which is written by Mr. Baker to Mr. Miller in reply to Mr. Miller's letter to National of May 17, 1932, which latter is Exhibit 339.

That will show that this letter couldn't possibly be 2727 a reply to it.

Mr. STEFFEN. I will state that we do not seem to have that reply, but, whether we did or not, that this letter would still be an acknowledgment in response to that matter.

Justice STEPHENS. We think that Exhibits 339, 340, and 341 are sufficiently identified and may be received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators; but that Exhibit 342 is not sufficiently identified to be admissible, at this time, and it is consequently not received in evidence.

(The documents referred to, marked as Government's Exhibits 339, 340 and 341, were received in evidence.)

By Mr. STEFFEN.

Q. Do you recall, in your report to Mr. Burley, that you mentioned, concerning the Dwight Hinckley matter, that you stated the final action of refusing to sell any longer?

A. Yes, sir, I gave the full report.

Q. And did you report the amount of board that was on hand, as you understood it?

A. Yes, sir.

Q. Have you an estimate of how much that was?

A. I wouldn't have the slightest idea, at this time, sir.

Q. Was it your understanding that Hinckley was 2728 going to sell his inventory out?

A. At lower prices, in an effort to further embarrass us for our action.

Justice STEPHENS. Is Mr. Burley living?

The WITNESS. Yes, sir.

Mr. BROMLEY. He was a defendant in the criminal case.

By Mr. STEFFEN.

Q. If I were to show you a document, would you perhaps have your recollection refreshed as to the amount of board that was on hand?

A. I don't think I would, sir.

Q. I don't think you should.

Mr. STEFFEN. I would like to ask the defendants to give me, if they have it, the purported reply to the letter of May 17.

Mr. BROMLEY. It was Exhibit 242 in the criminal case; you must have it, you subpoenaed it from us, and we gave it to you. We can give you a photostat of it. You certainly have got it.

(Photostat handed to Mr. Steffen.)

Mr. STEFFEN. May we show this to the witness?

Justice STEPHENS. Yes. Have it marked, if you wish, and show it to the witness.

Mr. STEFFEN. Will you stipulate that this is a genuine copy that was introduced in the criminal case as a 2729 copy of Mr. Baker's letter to the Board Survey, and was therefore probably a genuine letter?

Justice STEPHENS. Have you given it a number so that what you are saying will be identified in the record.

Mr. STEFFEN. I will have it marked as Government's Exhibit for Identification No. 343.

(The document referred to was marked as Government's Exhibit 343 for identification.)

Mr. STEFFEN. Did you stipulate—

Mr. BROMLEY (interposing). I stipulate it is a photostatic copy of reply to Exhibit 339.

Justice STEPHENS. Hand it to the witness, Mr. Marshal.

(Exhibit 343 for Identification handed to witness.)

(Witness examines Exhibit 343 for Identification.)

Justice STEPHENS. We have read it. Proceed.

By Mr. STEFFEN.

Q. Have you read Government's Exhibit 343 for Identification, Mr. Higgins?

A. Yes, sir.

Q. Does that indicate that the matter was closed at that time? I refer you to the last sentence.

A. Well, Mr. Baker was President of the company. I had no discussion with Mr. Baker on that matter. My discussions and reports were all with Mr. Burley.

2730 Q. And at this time, May 24, had the matter been settled as to whether you would sell Dwight Hinckley, or was it still subject to negotiation?

A. My reply on Government's Exhibit 341, dated May 25—I would say that I had been in telephone communication with Mr. Burley, and sent him this letter after my action.

Q. By "this letter", you mean what?

A. I would say that at that particular time I was operating without an office, and cleaned my correspondence up at the end of each week, so that this letter is dated the 25th, and my reply is dated May 27.

Justice STEPHENS. What do you mean by "this letter"—Exhibit 342?

The WITNESS. Exhibit 341, sir.

By Mr. STEFFEN.

Q. And your eply is in handwriting at the foot?

A. Yes; with the date of May 27. Mr. Baker's letter bears date of May 24.

Q. That is right.

Mr. STEFFEN. Now, Your Honor, I would make this point, simply that Mr. Baker's letter, which has been identified, Government's Exhibit 343, is obviously a reply to Mr. Miller's letter—

Justice STEPHENS (interposing). That is admitted, isn't it?

2731 Mr. STEFFEN. Yes. The point I am wishing to make is that the matter was apparently closed following Mr. Higgins' note on May 27, after this letter that Mr. Bromley handed me; and the letter which is Government's Exhibit 342 is dated the following day, May 28, and it seems that circumstantially it is very closely identified as a reply or as information given to the United States Gypsum Company.

May I ask one question further.

By Mr. STEFFEN.

Q. Would it be normal, in your understanding, to advise either USG or Board Survey on a matter of this sort?

A. I have never had any contact with Board Survey or USG.

Mr. STEFFEN. It has been stipulated or admitted by Mr. Bromley that Board Survey was a wholly-owned subsidiary of USG, and that they handled substantially the same matters. Mr. Henning would be the logical man to whom information of this character should be given.

Justice STEPHENS. The Court isn't clear what you are now trying to do. This letter, Exhibit 343, although not yet offered, has been identified by stipulation.

Mr. STEFFEN. I will offer it.

Justice STEPHENS. That may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.



2732 (The document referred to, marked as Government's Exhibit No. 343, was received in evidence.)

Justice STEPHENS. Now what is your contention—I think the Court doesn't understand your further contention with respect to this proposed Exhibit 342.

Mr. STEFFEN. Let me make it very clear.

Mr. Bromley objected to 342 upon the ground that it was obviously not a reply to Mr. Miller's letter of May 17, which is Government's Exhibit 339. The reply has now been introduced. This is Mr. Baker's letter of May 24, which is Government's Exhibit 343. And by the last sentence of that Exhibit, 343, it appears that the matter is not yet fully adjusted, that they will either quit selling, as Mr. Baker says, or they will do something else.

We then have Government's Exhibit 341, which is dated May 25, and which contains a note at the bottom dated May 27, signed by Mr. Higgins, in which he says what he is going to do.

Justice STEPHENS. Let me get that so I can follow you. Which contains what, you say?

Mr. STEFFEN. Exhibit 341 contains at the foot of it a handwritten note by Mr. Higgins, under date of May 27. That is going back, you see, to Mr. Burley on that date.

Justice STEPHENS. Who is "Ralph"?

2733 The WITNESS. Ralph Burley.

Mr. STEFFEN. And Ralph Burley purports to write a letter on the 28th, in direct connection with this whole matter, which the witness testifies states substantially his understanding of the outcome of that whole maneuver. And this letter has been taken from the files of National, and it would seem to be about as well identified, circumstantially, as it could be.

Justice STEPHENS. Now there are two problems arising in the Court's mind. First, with respect to Exhibit 342, it isn't yet testified by anyone that it was written by Burley. It bears the printed name, R. F. Burley, Vice President. In addition to that, this handwritten material on Exhibit 341, which is now in evidence, says:

"Ralph—Should Dwight Hinckley send in an order I suggest writing them and stating that you do not understand—inasmuch as they have repeatedly informed me they would not give us any more business and that they had already made a connection from whom a car of lath had already been unloaded—Then that you are turning over to me to handle—

"This sharpshooter would start a suit immediately if he thought he could collect a thousand dollars.

"Ike and I are good personal friends and I intend to keep in touch. Higgins."

Now that apparently suggests that a letter should  
2734 be written to Dwight Hinckley.

Mr. BROMLEY. That is right.

Justice STEPHENS. Does it not?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Whereas, this letter, Exhibit 342, is written to Mr. Henning. What is the contention of counsel? Do they still object to this?

Mr. BROMLEY. Yes, on the ground that it has not been identified.

Justice STEPHENS. Do you still object, Mr. Finck?

Mr. FINCK. Yes, Your Honor, I know nothing about it.

Justice STEPHENS. I am not inviting objections, we have enough of them without invitation, but we want to know what the position of counsel is.

Mr. OLIVER. I think all the rest of the defendants object to it, too, on the same grounds.

Mr. STEFFEN. I think the only thing that I can say which would perhaps warrant the Court in changing its opinion from what its first ruling was, is that the letter of May 24 from Mr. Baker to Mr. Miller, under date of May 24, clearly indicates that the matter was not concluded at that time, that they were going to take one of two courses. It says at the bottom:

"We recognize that such a policy is detrimental to our interest with other dealers and for that reason we  
2735 hope to either correct this policy or discontinue the sale of Gold Bond wallboard to this account."

Now the witness testified—I grant Your Honor's position that Exhibit 341 and the footnote does not add much to my case—but the witness has testified that immediately afterwards—and he fixes his dates by the letter, Exhibit 341, dated May 27, that is, his footnote is dated May 27—that he did make a report to Mr. Burley, who was his superior, and that he had in that interim taken a decision and had discontinued selling the Dwight Hinckley account, and that the only question then was what are they going to say if they put in another order, that is, what sort of a reply would you make to Dwight Hinckley if he puts in another order. That indicates that they had then taken their decision. And that is, I think, brought out in Exhibit No. 341.

Then in 342, we have a copy of a letter addressed to Mr. C. Henning, Vice President in charge of sales, USG,

which relates the exact position which the National people had determined to take, through Mr. Higgins and his report.

We then have identified each of those different paragraphs substantially as stating the substance of what Mr. Higgins had reported. It would be normal to report that; to write, at the conclusion of such a transaction, just such a letter as Mr. Burley did write. It is perfectly open that this is just a circumstantial identification. There is 2736 going to be no injustice done, the defendants have an opportunity to call Mr. Burley, he is one of their higher executives.

Justice STEPHENS. Sometimes, if I may make a remark in good part, sometimes I think that in these hotly contested trials where both sides push their cases with natural vigor, we ought to have a schedule with respect to the seriousness of objections. Are they very serious, or moderately serious, or just serious, or just pro forma? (Laughter.)

But we have no such schedule. An objection is an objection. We say this also, of course, as we hope we say everything, in good part, Mr. Steffen, that your statement that it is Mr. Burley's letter is the very point in issue; and whether it is Mr. Burley's letter is the question, whether it is circumstantially identified as his letter.

Mr. STEFFEN. I didn't want to lead the Court in that matter, Your Honor.

Justice STEPHENS. You have not misled us, I am sure.

I am sorry, Mr. Steffen, we all feel, after consultation, that while it may be close to the line of circumstantial identification, we will have to put you to the trouble of calling some other witness to identify it. Exhibit 342 is not received in evidence.

Mr. STEFFEN. I would now like to go back to the invoices, two of which I think we identified—those are Government's Exhibits 336 and 337; also 338. Will 2737 you show the witness Government's Exhibits 336, 337, and 338?

(Exhibits handed to the witness.)

Justice STEPHENS. Is Exhibit 338—

Mr. STEFFEN (interposing). I don't think it has been identified yet, has it?

Justice JACKSON. It has been marked.

Mr. STEFFEN. Yes.

I offer all three exhibits, 336, 337, and 338.

Justice STEPHENS. Is 338 the one which has Order No. 264 at the upper right-hand corner?

Mr. STEFFEN. Yes.

Justice STEPHENS. And has that already been shown to the witness?

Mr. STEFFEN. He has it before him, and I think has identified it.

Justice STEPHENS. Is there any objection to those? Those were clearly identified?

Mr. STEFFEN. Yes, but none of them have been admitted in evidence. I am offering all three at the moment, Exhibits 336, 337, and 338.

Mr. BROMLEY. The defendants object to them on the ground, first, that they are incompetent because not binding on any of the defendants, but in connection with the objection of incompetency we make no point as to lack of identification; and of course if admitted we make the usual objection to them.

2738 Justice STEPHENS. The Court thinks they are admissible in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits Nos. 336, 337, and 338, were received in evidence.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 344, Mr. Higgins, which purports to be a memorandum from Mr. Baker to Mr. Burley, under date of December 16, 1932. Will you please examine that, Mr. Higgins, and tell us if you recognize the writing on the bottom of it, or the initials at the top of it?

A. No, I don't think I do.

Q. Who, in National, if anyone, had the initials "EBB"?

A. Ed Biesinger.

Q. Could you say whether or not those are his initials?

A. I don't think I could positively, sir.

Q. Are they similar, or have you doubts as to that?

A. All I might say is that they are not dissimilar.

Justice STEPHENS. Had you seen his handwriting from time to time?

The WITNESS. Yes, sir, but I haven't seen it in 7 years.

2739 By Mr. STEFFEN.

Q. I show you Government's Exhibit 339, which I think has been identified, and ask if you will compare those?



Mr. BROMLEY. Of course, the witness refused to identify the writing on that exhibit, Mr. Steffen.

Justice STEPHENS. Yes, the witness said he could not identify that.

Mr. OLIVER. The witness is not a handwriting expert.

By Mr. STEFFEN:

Q. Are you able to say whether those are Mr. Biesinger's initials?

A. Well, EBB are his initials.

Q. Well, what would you say as to whether he wrote them?

A. I couldn't say.

Q. Now I would like to have you consider for a minute or two the situation in Detroit, in your company. Do you operate in Detroit under your firm name of Quality Materials Company?

A. Yes, sir.

Q. What sort of an operation do you have there?

A. We differ from our other operation in that we maintain a warehouse and yard for dealer pick-up in small quantities, that is, quantities less than our ordinary unit of sale of truck or carload.

2740 Q. And does that cover your whole line of sewer pipe and everything that you carry?

A. Yes, sir.

Q. And do you have added to your line there in Detroit any gypsum products?

A. Yes, sir.

Q. What do you have?

A. We have gypsum lath and gypsum wallboard.

Q. And where do you obtain them?

A. We have been buying those from the National Gypsum Company.

Q. And in what quantities?

A. In the unit of sale for the market which, in Detroit, is ordinarily truckload or carload quantities.

Q. And how do you sell those out?

A. We sell those out in small lots.

Q. What is your mark-up?

A. The mark-up runs about 12½ percent, it is strictly a convenience item, not a volume item, with us.

Q. And why do you carry that?

A. We carry that for the reason that a dealer coming to our yard to pick up refractory material, face brick, sewer pipe, or insulation materials, at times wants two or a dozen

or 20 pieces of wallboard, or a certain number of bundles of gypsum lath. He may be a small dealer, unable to  
 2741 carry a representative stock. And he uses our warehouse as a convenience for picking up those materials.

Q. And would you say that in handling gypsum board and gypsum plaster in that way, you were doing a jobbing business?

A. No, sir, we are doing a warehouse business.

Q. And about what would your sales on that sort of thing run per month, could you tell us?

A. I would say they average around \$500 per month.

Q. And that would be a relatively small item with you?

A. That is the smallest item we have.

Q. That \$400 or \$500 is your gross sales for board?

A. That is net sales, that is probably our average payment on a net basis to the National Gypsum Company.

Q. For board and plaster?

A. For board, plaster, and lath.

Q. Now you left the National Gypsum Company in October, 1937, I believe?

A. Yes, sir.

Q. For a period just before you left, did you sell perforated lath in your territory?

A. Perforated lath had been introduced before I left the gypsum industry.

Q. And could you describe the perforated lath which National made?

2742 A. Well, in appearance it was similar to any other perforated lath on the market. I had never been told, or I had been told but I had never checked—I understood the spacing of the holes was different.

Q. What was the spacing?

A. The holes in competitive lath, or the perforations, were spaced on certain centers—

Q. (Interposing.) Approximately 4-inch centers?

A. I wouldn't know, sir. But I would say that that was the only difference, and I never checked that so I wouldn't know if it was a difference. I took Mr. Crandall's word, of National, for it.

Q. Did you sell the National gypsum lath as gypsum lath which would pass the one-hour fire test?

A. The tests on Gold Bond perforated lath showed that it would pass the one-hour fire test.

Q. Were the holes in the board in parallel rows or were they staggered, can you remember?

A. I would say that they were staggered, and that they may be parallel, but my mental picture now, right now, is that they were staggered.

Q. During this period did you sell National gypsum lath in competition with other manufacturers in the territory?

A. Yes, sir.

2743 Q. Do you recall whether you sold it at the same price as ordinary gypsum lath?

A. To the best of my knowledge, I think we had a 25-cent per thousand mark-up on perforated gypsum lath.

Q. Would you say that your price was the same as that of other manufacturers in the territory?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion.

Justice STEPHENS. Do you know?

The WITNESS. It must have been the same, sir. We got our share of the business.

Justice STEPHENS. Objection overruled.

Mr. BROMLEY. I move to strike out the answer as immaterial. On what charge does this bear? There is no charge in the complaint that we conspired with National to fix their price on a product which they manufactured and sold under their own patent.

Justice STEPHENS. We thought the examination had to do with lath made under the license agreement patent.

Mr. STEFFEN. This has to do with lath made by the National Gypsum Company, perforated lath, and I am merely getting the evidence to the effect that it was sold in the market in Mr. Higgins' territory at the same price as that of any other gypsum lath, perforated lath, at that time.

2744 Mr. BROMLEY. Your Honors will recall that National had no license under our perforated lath patent, they refused to take it, they went out and tried to design around our patent, and get a perforated lath of their own and they sold it, they were free to sell it at whatever price they wanted to. There is no charge that within the conspiracy with which we are charged in the bill of complaint, we had any understanding with them that they would sell their perforated lath at our price. We had nothing to do with it.

Mr. STEFFEN. Your Honor, this will raise, I take it—and this is the only question I have on the point—the matter that we are going to discuss when we take up our offer of proof. I would like to say for the record in reply to Mr. Bromley, that our charge in the complaint is that they have

conspired to restrain trade of all gypsum board, the prices of all gypsum board, and that includes perforated lath.

Now in paragraph 45 (a), which I think we are all familiar with, we say that that was done for the purposes of dominating the market by fixing uniform prices on board manufactured and sold by these defendant companies.

Now there is no question but what this is board manufactured and sold by National, and we say that they are fixing uniform prices, and the witness has testified that the price was uniform on that board.

Now whether it comes under the license or not is 2745 utterly immaterial. I say that that is a matter that you can pass on now, finally, or which can be reserved if you think it best.

Justice STEPHENS. Well, the Court will reserve its ruling on the motion to strike as immaterial, in order that it may rule upon this with all of the other items of this class which are to be discussed when we get to the argument and the consideration of the authorities on these many reserved rulings.

Mr. BROMLEY. If that be the case, I now move to strike out all of this witness' testimony with respect to perforated lath.

Justice STEPHENS. That motion may be shown of record, and the ruling on it is reserved, for the reasons just stated.

Mr. STEFFEN. I think, if your Honor please, that we might take our afternoon recess at this point, if that is satisfactory.

I would like to introduce my friend and neighbor, United States Marshall Fitch, from New Haven.

Justice STEPHENS. The Court is glad to know the Marshall, and I will be glad to shake hands with him during the recess.

We will now take a five-minute recess.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

2746 Justice STEPHENS. Proceed.

Mr. STEFFEN. We have no further questions.

Justice STEPHENS. Cross-examination.

#### CROSS-EXAMINATION

By Mr. BROMLEY.

Q. Of your twenty to fifty salesmen which you had under your jurisdiction when you were central sales manager for National, how many worked the Cleveland territory?

A. Two.



Q. How large was the Cleveland territory when you had charge of it?

A. Cuyahoga County.

Q. And in miles that represented a radius around Cleveland of how much?

A. That is about forty square miles.

Q. Now National's customers in the Cleveland area were building material dealers, weren't they?

A. And lumber dealers.

Q. And lumber dealers?

A. Yes.

Q. And those dealer customers of National bought from National at what we have referred to as the dealer price?

A. That is right, sir.

Q. I am talking about patented gypsum board, now, do you understand that?

2747 A. Yes, sir.

Q. And those dealers who bought patented gypsum board from National at the dealer price, resold it to their customers who were building contractors and private consumers, is that right?

A. That is right, sir.

Q. Now at all times while you were there, the Cleveland area was a very competitive market indeed, wasn't it?

A. Yes, sir.

Q. And isn't it true that all the time while you were there, that there was the very keenest competition among board manufacturers in the Cleveland area?

A. Yes, sir.

Q. Among others, USG, Certain-teed and American were selling in that area to dealers?

A. Yes, sir, that is true.

Q. And you, of course, during all the time you were there, were out to get all the business you could from the dealers, weren't you?

A. Yes, sir, that is correct.

Q. Dwight Hinckley was a dealer, wasn't he?

A. Dwight Hinckley is and has been known as a wholesaler, but he does sell to industrials at retail.

Q. Now what do you mean by "industrials"?

A. The large manufacturing plants, or to large  
2748 contractors, on a large housing job. He would take large jobs on a retail basis.

Q. When you say that Dwight Hinckley sells to large contractors at retail, or makes retail sales, you mean that Dwight Hinckley to that extent was acting as a dealer, don't you?

A. Yes, sir.

Q. So that one part of his business in patented board, during all this period, clearly was that of a dealer, wasn't it?

A. Yes, sir.

Q. Now you said he had another aspect of his business which you call wholesaling.

A. Yes, sir.

Q. And in that aspect of his business he was selling the patented board not to contractors but to other dealers?

A. That is true.

Q. So that isn't it the fact, Mr. Higgins, that Dwight Hinckley, during all the time you were there, was in competition, first with your National Gypsum Company?

A. Well, not while he was selling our products.

Q. Well, wasn't he selling your products to the very same class of trade that you were selling your products to?

A. Yes, sir, but we had a line of demarcation. There were certain types of dealers that we did not care to solicit, they were the so-called wrecking houses, and we solicited what we would call the large volume and better 2749 type of accounts, and Dwight Hinckley's place in the picture was to handle the wrecking companies because the larger dealers objected to being in competition with the same brand of merchandise that the wrecking companies were selling.

Justice STEPHENS. What do you mean by "wrecking companies", companies that tear down houses and resell the materials they find in them?

The WITNESS. Yes, sir, and to that they also add new merchandise. The average wrecking company in a large city today—the used lumber that they have in their yard is a very, very small part of their sales, and it is a lead. Most of the public thinks they are getting a better price whereas the price is about the same as that of a regular retail yard.

Justice STEPHENS. Proceed, Mr. Bromley.

By Mr. BROMLEY.

Q. So that the Dwight Hinckley Company in that aspect of its business as a wholesaler, sold your board really to a very limited market?

A. Yes, sir.

Q. Now in the aspect of Hinckley's business as a dealer, he was in direct and active competition with all other dealers in that area, was he not?

A. That is true.

Q. And therefore, he was in direct and active competition with those forty or fifty customers of yours to  
2750 whom you sold National's board, who were dealers themselves?

A. That is right.

Q. So that in that aspect of the situation, National was selling its patented board to half a hundred dealers in the Cleveland area, of whom Hinckley, in that aspect of its business, was one?

A. That is true.

Q. Now isn't it a fact that there came a time in 1932 when Hinckley, as a dealer, began to sell patented board to his contractor customers at less than it cost him to buy it from you?

A. I don't recall the date, sir, but there was such a period.

Q. There was such a period?

A. Yes, sir.

Q. And you became aware of Hinckley's practice of selling your patented board at less than cost, did you not?

A. Yes, sir.

Q. And didn't you become aware of that by reason of the fact that your other dealer-customers complained to you about it?

A. That is right.

Q. Hinckley being in competition with your other dealer-customers, was underselling them to the same class of trade that they were selling the National patented board  
2751 to, is that right?

A. That is correct.

Q. And they came to you and complained about it?

A. That is right.

Q. And that happened long before you ever heard anything from USG about this situation, didn't it?

A. I never heard anything from USG, sir.

Q. Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?

A. The fact that he was selling at \$1.50 lower per thousand square feet to the same class of trade that we were soliciting, and they, on the same brand of board, were therefore out of line and unable to get the business.

Q. And didn't they come to you and say, "Hinckley is selling at this \$1.50 lower figure—it looks to us as if you must be giving Hinckley some kind of a price concession that you are not giving to us"?

A. We were accused of that.

Q. You were accused of that by your other dealer-customers, weren't you?

A. Yes, sir.

Q. Now the price at which you could sell Hinckley as a dealer, and all of your other dealer-customers, you knew was fixed by USG under the price bulletins, didn't you?

2752 A. I knew it was fixed by the price bulletins I received from our Buffalo office.

Q. So far as board was concerned?

A. Yes, sir.

Q. That is to say, your instructions in your price bulletins were that your price to your dealer-customers, including Hinckley, must all be the same?

A. That is right.

Q. Now His Honor, Judge Stephens, said a minute ago, "Well, you would know, wouldn't you, Mr. Higgins, whether, as a matter of fact National was selling Hinckley at the correct price or not?" Now the answer to that question is that of course you would know, isn't it?

A. I certainly would, yes, sir.

Q. But your other dealer-customers who saw Hinckley selling at a low price, suspected you of selling Hinckley at a cut price, didn't they?

A. That is correct.

Q. Now being faced with that situation, were you fearful that your other dealer-customers, other than Hinckley, would cease to deal with you because of their suspicions that you were favoring Hinckley?

A. Had I continued to sell Hinckley, yes.

Q. What proportion of your Cleveland business did the Hinckley business represent?

2753 A. I would say about six to eight per cent.

Q. And that means that your other forty-nine or so dealer-customers represented over ninety per cent of your total Cleveland business?

A. That is correct.

Q. And did you feel at that time that you were faced with a choice of either continuing to serve Hinckley and perhaps lose some substantial part of the other ninety per cent of your business, or cut Hinckley off and retain the other ninety per cent of your business?

A. I knew that I was faced with making a decision on that.



Q. And did you feel that you had to make a decision to cut Hinckley off and retain the ninety per cent of your customers, or else go on and sell Hinckley and lose a large part of the ninety per cent of your customers?

A. I knew I had to make the decision.

Q. And you did make it?

A. Yes, sir.

Q. Now did you make it in consultation or arrangement with any other manufacturer or anybody else outside of your own company, whatsoever?

A. Not even with anyone in my own company. Mr. Burley always operated on the basis that the division manager was responsible for sales and details in his territory, or his division.

Q. So that was your decision and yours alone, was it?

A. Yes, sir.

Q. And did you make it without consultation, then, with anybody in the world?

A. Except the territory men.

Q. Except your own salesmen?

A. Yes, sir.

Q. You did consult with them?

A. Naturally.

Q. Now when you had reached that decision did you go to the Hinckley concern and tell them?

A. Yes, sir.

Q. And is this Ike Harris, whose name has been referred to, the president of Dwight Hinckley Company?

A. He was the manager of the Cleveland branch.

Q. And he was a good friend of yours?

A. Yes, sir.

Q. And did you explain to him the reasons, as you have told them here, for your decision?

A. Yes, sir.

Q. And did he thereupon, in response to your talk with him, lower his price still further?

A. Yes, sir.

Q. Now he was able to do that because he had a large stock of National board on hand, didn't he?

A. I don't remember what his exact inventory was. We took inventory at the time, but I don't recall what the figures were.

Q. Well, anyway he had board on hand so he was enabled to go into the market and still further cut the price, and that is what he did do, isn't that correct?

A. That is true.

Q. Now at that time did he tell you that he wouldn't do business with you any more?

A. Yes, sir, he did.

Q. And thereafter you know, do you not, that he bought his board from one of your competitors?

A. I do, sir.

Justice STEPHENS. Who was this man "Ike"?

The WITNESS. I. C. Harris—Ike Harris. "Ike" is a nickname.

Justice STEPHENS. And he was with what company?

The WITNESS. He was Cleveland manager of the Dwight Hinckley Lumber Company.

Justice STEPHENS. I thought that, but I wanted to be sure.

The WITNESS. Yes, sir.

Justice STEPHENS. Who was the person that you referred to as a "sharpshooter"?

The WITNESS. That was my friend Ike Harris.

2756 Justice STEPHENS. That was a term of endearment, then?

The WITNESS. Well, there are certain classifications of "friend", I might put it that way. (Laughter.)

Mr. BROMLEY. You remind me of the legal business, sometimes. (Laughter.)

By Mr. BROMLEY.

Q. Now, Mr. Higgins, you would have liked to continue to sell Hinckley if you could without damage to the rest of your customers, wouldn't you?

A. Yes.

Q. You wanted to sell all the board you could sell?

A. That is correct.

Q. But you were faced with a dilemma as to whether you would lose a large part or a small part of the business?

A. That is true.

Q. So would it be accurate to say that your conclusion was reached for the purpose of protecting your own market and not for the purpose of attempting to influence or maintain Hinckley's prices?

A. That is correct.

Q. Did you ever make any attempt to persuade the American or the Certain-teed or the USG not to sell Hinckley after you announced your decision to him?

A. During the period that I was connected with the National Gypsum Company I had no contact with

2757 any competitive company or any discussion of any sort.

Q. Then your answer to my question is "no"?

A. That is right.

Q. Now will you look at Exhibit 339, please?

A. Yes, sir.

Q. You have read that exhibit, haven't you?

A. Yes, sir.

Q. Will you look at the second sentence in the first paragraph? Isn't that letter a complaint by Board Survey against National, alleging that National's price to Hinckley must be lower than the USG bulletin price on account of the fact that Hinckley was selling at so low a price?

A. I would interpret this letter to mean just that.

Q. In other words, there was nothing strange in your business at that time for a competitor to view what one of your customers was doing, and then conclude that if your customer was selling at a low price, you must be furnishing him at a price lower than you were permitted to do under the USG price fixing bulletins—there was nothing unusual about that, was there?

A. No, sir, it would be a logical assumption.

Q. And if you saw a dealer in the Cleveland market, who was supplied by USG, selling at a very low price, you would suspect that USG was selling that dealer at a price less than it fixed under the licenses, wouldn't you?

2758 A. I would also accuse them of it.

Q. You understand that in all my questions I am talking about gypsum wallboard and plasterboard, don't you?

A. Yes, sir.

Q. So that it was a reasonable inference for one of your competitors, indeed for USG, to make, based on what Hinckley was doing, that the price which you were charging Hinckley might have been lower than the bulletin price, isn't that so?

A. Yes, sir.

Q. Now, you knew, however, that your price to Hinckley was correct?

A. I was certain of it.

Q. According to your own price bulletin, I mean.

A. Yes, sir.

Q. And when you went there you found out that what he was doing was deliberately selling below cost?

A. He admitted it.

Q. And he was using the product he bought from USG as a leader?

A. That is true.

Q. And that means that he was deliberately selling your product at a low price in order to induce prospective buyers to buy other products from him?

A. That is correct.

Q. And he hoped to make up his loss on your board  
2759 by the profit he would make on other products?

A. That is true.

Q. And you didn't want any longer to supply a customer, to sell a customer of yours, who followed that policy, did you?

A. We couldn't afford to do so.

Q. And you couldn't afford to do so because of the adverse effect it would have on your other customers?

A. That was the reason.

Q. Now will you look at Government's Exhibit 343, please, and particularly at the second paragraph. Doesn't that confirm your recollection, the second sentence in the second paragraph, that the National Company had known about the Hinckley situation, having heard about it from its own dealer-customers, before they ever received any complaint from USG or other communication about the situation?

A. I don't know when or if they did receive any communication from USG.

Q. But it is true, as stated in the second sentence of the second paragraph, that the National Company had had its attention called to the Hinckley practice some months prior to May?

A. That is true.

Q. And the people who called their attention to it, as you have said, were National's dealer-customers?

A. And our own salesmen reporting the condition  
2760 both to me, and I, in turn, to the Buffalo office.

Q. Now this writing at the bottom of Exhibit 339— whoever wrote it—is a summary of an investigation someone made into the National's books, supporting National's position that it had not violated USG's price bulletins in its sales to Hinckley—isn't that right?

A. I would say that that was true, sir.

Q. And this reference at the beginning, "There isn't a c/m"—that means a credit memorandum, doesn't it?

A. Yes, sir.

Q. (Continuing.) —"or allowance of any kind on our books for the past 8 months".

Let me ask you this. One way that a manufacturer could violate the USG price bulletins would be to sell a dealer-



customer at the proper price and then later, pursuant to an oral arrangement, give him a rebate by giving him a credit memorandum or an excessive allowance, isn't that right?

A. That would be one way, sir.

Q. I don't mean that you ever did that, but that would be one way?

A. That would be one way, yes, sir.

Q. So this gentleman who investigated the books reports that there wasn't any credit memorandum or any allowance of any kind made to the Hinckley Company, and that was evidence in support of the defense that National had never cut the price to Hinckley, wasn't it?

A. Well, I knew that to be a fact.

Q. And you understand that in everything I have said, I am referring to gypsum board?

A. Yes, sir.

Q. And to nothing else.

A. That is right.

Q. And then the rest of that note is information about the recent invoices and the state of the account, to show that no price cut had been made in any direct way by extending undue credits or anything like that, isn't that right?

A. That is right.

Justice STEPHENS. What is meant by the phrase, "somewhat extended datings"?

The WITNESS. Well, with the small margin that existed in the handling of some materials, and in the eagerness of a newer manufacturer coming into the market to take an important account, and the Dwight Hinckley account was a good volume account—in the early days of our operation under the license agreement, and before it was understood very thoroughly, we would attract good-sized accounts with a dating, taking a discount at the end of ninety days. That was discontinued because it was a violation of the discount terms. That is what is meant by "dating". The only account that we had in our area where that was done was the Dwight Hinckley account, and there was a controversy for about sixty days on the discount that he took that he later paid because it was illegal.

By Mr. BROMLEY.

Q. What you mean is that this reference to which Judge Stephens has called to your attention of "extended datings" is a reference to granting a purchaser more than

usual discounts, so as to indirectly effect a reduction in price?

A. Not more than the usual discount, but longer discount terms.

Q. Longer discount terms?

A. Yes, on the theory that he would have his merchandise turned over and receive his money, and not have his money tied up it.

Q. Is it true in the board business that the usual period of the initial discount was ten days?

A. Or, in the large markets, a "prox." date.

Q. What was meant by a "prox." date?

A. Which could be either a tenth or fifteenth of the month.

Mr. STEFFEN. May we have that fixed as to time, whether the witness is speaking of a practice now or as of 1928, 1929, and 1930?

Mr. BROMLEY. I am asking him this question with respect to 1932, because Exhibit 339 is dated in 1932, and this handwriting, this handwritten note was made in 2763 1932. Is your answer as of 1932?

The WITNESS. Yes, sir. "Prox." dates were prevalent in the large major markets that I was operating in.

By Mr. BROMLEY.

Q. So that if National said to a dealer-customer, "You can get your discount even though you don't pay for ninety days", instead of the next tenth or fifteenth, that would be extending him a valuable consideration by giving him an extended period of credit before he had to pay?

A. That only happened once, and it is a happenstance that it happened in the Dwight Hinckley case. That was the only deviation and it was caused by a misunderstanding by the salesman in the territory making the commitment after we received our first price bulletin after the license agreement was signed.

Q. I am merely trying to get an explanation of the phrase "extended datings". Now it is an extension of the discount period for an unduly long time so as to accord a greater period of credit to the customer. isn't it?

A. Yes, sir.

Q. And that is an indirect way of accomplishing a price reduction, in effect, isn't it?

A. It would be.

Q. Because a long extension of credit is a thing of value to the customer?

2764 A. Well, his competitor is using his money and the man getting the dating is not having to use his money, not having his money tied up.

Q. Now everything you have said about this is again related entirely to gypsum board, is it not, Mr. Witness?

A. Yes, sir.

Q. Now will you look at Exhibit 340, and to the first sentence of the exhibit, to the effect that Chicago will do nothing to stop Port Clinton pick-ups and trucking. That is a reference, is it not, to the fact that dealers were permitted at this time to pick up board at the Port Clinton plants of USG and American, and truck it back into Cleveland?

A. That is correct.

Q. Now that was a practice that was specifically provided for in the USG price bulletins issued to its licensees, did you know that?

A. Yes, I surmised that it was after checking to see why we could not be competitive on a similar situation in Cleveland.

Mr. STEFFEN. Your Honor, ought we not to have the price bulletins referred to, as they are the best evidence of what they contain?

Mr. BROMLEY. They are in evidence, and they do provide that as of this time.

Mr. STEFFEN. That is your testimony.

2765 Mr. BROMLEY. No, it is the testimony of the bulletins.

Justice STEPHENS. If they are in evidence, and it is without dispute that they do so provide, this seems to be immaterial; I mean to say that the objection is not well taken.

By Mr. BROMLEY.

Q. Now so far as the provisions of the bulletins issued to your company were concerned, you had the same right under the bulletins, didn't you?

A. I never saw any but our own bulletins, Mr. Bromley.

Q. Well, the reason that you were not competitive with USG and American was that you didn't have any plant in Port Clinton, is that correct?

A. That is true.

Q. Your nearest plant to Cleveland was what?

A. Clarence Center, New York.

Q. And that was several hundred miles away from Cleveland?

A. Two hundred and fifty.

Q. So that you thought that this provision permitting the licensor and the licensees, with mills at Port Clinton, to allow dealers to come and pick up by truck, put you at a competitive disadvantage, did you not?

A. That is true.

Q. And wasn't the purpose of your discussion about this matter merely to see if Burley couldn't induce USG 2766 to change its bulletin provisions so that dealers could no longer pick up at Port Clinton mills?

A. I told him it was necessary to do that or we would be out of the market.

Q. In other words, you wanted the licensor to change the price bulletins so as to make you competitive with USG and American?

A. That is correct.

Q. This practice of permitting dealers to pick up board at the Port Clinton mills and truck it back to Cleveland, was a privilege for which the manufacturer-seller made no charge to the dealer, isn't that correct?

A. That is correct.

Q. And it was of substantial value to the dealer because he was enabled to get his board back to his warehouse or his customer at a cost less than the railroad freight would have been, isn't that right?

A. No, I wouldn't say that, Mr. Bromley, because I don't think you can truck that distance and be competitive with railroad freight. It gave them the opportunity of buying in smaller lots because, to the best of my knowledge, there was no minimum requirement as to the quantity that could be picked up at the plants in the early days of pick-up. I may be wrong on that, but that is to the best of my knowledge.

Q. Well, whatever it was, it was an advantage to 2767 the dealer which was worth money to him?

A. I considered it more of an advantage to the American Gypsum and to the United States Gypsum.

Q. But the reason that you were non-competitive, sir, was that the dealer preferred to buy from USG and American and be enabled to go and pick up small quantities in his truck, rather than to buy a carload of board from you shipped from your far-distant mills, isn't that right?

A. Well, the date of the letter would prove that it was a low spot in the building cycle. May, 1932, was pretty close to our bank holiday. Building was at a very low ebb and dealers would pay a premium to have the privilege of keeping down their investment. So that we were faced



with the choice of being out of the market or setting up something that was competitive with the advantage enjoyed by them, not that the dealers preferred buying from American or USG, but they did enjoy the fact that they did not have an inventory tie-up of capital.

Q. Now was there anything that you could have done to make yourself competitive with USG and American in the Cleveland market?

A. There was, yes, sir.

Q. There were two things you could have done, were there not?

A. Yes, sir.

2768 Q. You could have gotten USG to change the bulletins so that dealers could no longer get their pick-up service in small quantities—that is the first thing you could have done if USG had been willing?

A. That is one, yes, sir.

Q. The second thing you could have done is to build, rent or establish a warehouse of your own in Cleveland?

A. No, sir, we would have had to establish a warehouse at Port Clinton.

Q. At Port Clinton?

A. Yes. We were not allowed, as I was told by Buffalo, to establish a warehouse in Cleveland and be on a competitive basis and sell at the same price as Port Clinton.

I shipped carloads of plaster to big jobs in Cleveland, and allowed a trucking allowance from cars to job, in order to precipitate the Port Clinton situation. That is what is referred to in the balance of my footnote.

But we were forced—and I checked into the warehousing situation in Port Clinton—where it would have been necessary to ship from National City, Michigan, to Port Clinton, unload the merchandise, put it into the warehouse, then put it back on the trucks and truck it into Cleveland. We couldn't unload from the cars to trucks in Port Clinton, and then truck it into Cleveland, according to a true interpretation of the license agreement.

2769 Q. If you had established a Port Clinton warehouse and done that trucking, it would have cost you a considerable amount of money?

A. Very much.

Q. So you didn't want to do that, did you?

A. I did, but Buffalo didn't.

Q. Buffalo would have preferred if it could, to have induced the licensor to change the bulletin practice, wouldn't it?

A. Yes, sir.

Q. Now isn't it a fact that at the time it was your opinion that USG was making this complaint against National regarding National's board prices to Hinckley, for the purpose of throwing a smokescreen over your request that USG make you competitive in the Cleveland area?

A. I think it must be getting late, I don't think I caught the early part of that, Mr. Bromley. (Laughter.)

Q. I don't blame you. Well, look at your note at the bottom of Exhibit 340, starting, "I prophesy".

A. That is the answer to your question. In other words, I felt that USG was not in a position where they had to follow the request of National in making the Cleveland market competitive, and that any promises were purely a smokescreen.

2770 Q. You didn't think that USG would change the Bulletin if National requested it to, as to this board pick-up, did you?

A. Well, I never took the promises of any competitor very seriously until he fulfilled them.

Q. And you thought that U.S.G. was accusing National of violating the price bulletin in its sales of board to Hinckley merely as a smoke-screen to give an excuse for not changing the pick-up situation in the bulletin?

A. I thought that the two would be related, yes, sir.

Justice STEPHENS. The two would be what?

The WITNESS. The two would be related.

By Mr. BROMLEY.

Q. Now will you read your handwriting at the top of Exhibit 340? It is not plain on my copy?

A. That is embarrassing.

Q. Not to me it isn't.

A. Well, it shows how over-ambitious a little fellow can be once in while.

Q. You are not a little fellow, Mr. Higgins.

A. Thank you. "Reply attached and I might say in cold blood that I am serious in the statement made that I would run USG out of Cleveland unless they quit their constant knocking of National and our policies."

Q. Does that refresh your recollection, sir, that  
2771 not only was there vigorous competition in your area, but there was pretty bitter competition?

A. Yes, sir; there was.

Q. And you had a real fight for business all the time you were there, didn't you?

A. Yes, sir.

Q. Now when you used the words, "run USG out of Cleveland", you meant by going in there with a concentrated and aggressive selling campaign and taking business away from them, didn't you?

A. My whole plan of attack was to put about six of our real high-powered operators into the Cleveland market, where we only then had two, to go out and solicit the industrials, solicit the users of board even the 100 and 200 and 300 foot buyers; force a demand for Gold Bond board and force the dealers to buy it, and thereby eliminate USG who at that time, in 1932, didn't have much more manpower in the market than we did. But by creating consumer demand, that was about the only way we could do it. It would cost a lot of money.

Q. That didn't mean that you contemplated entering into an agreement or understanding with American or Certain-teed with report to board sales, did it?

A. They were still as much of a competitor as USG, sir.

Q. Will you look, please, at Exhibit 341. Your handwriting at the bottom of that exhibit represents  
2772 a record of your decision no longer to sell board to Hinckley, doesn't it?

A. Yes, sir.

Q. And did this "sharpshooter" reference to Mr. Harris, or to Dwight Hinckley, express your view of that concern at that time?

A. Yes, sir.

Q. Did you mean by that that his business ethics were not very high?

A. His business ethics were all right, it was just the fact that he was using our product as a loss leader, with a bad reflection on National. His business ethics were all right with that one exception.

Q. And you felt that such a policy on the part of Hinckley would have been ruinous to the National's board business in that area?

A. It would have been, yes, sir.

Q. Now as I understand you, sir, your present company, the Quality Materials Company, has been dealing in board in Detroit right along up to the present time?

A. Yes, sir.

Q. Didn't I understand you to say, on direct, that a jobber was a man who bought board from a manufacturer and resold it to dealers at a profit?

A. That is true, sir.

Q. That is just what you do in Detroit, isn't it?

2773 A. I wouldn't say that we get a profit on board in Detroit.

Q. Isn't the mark-up which you charge dealers in Detroit just about the same as the discount which formerly you get in the board business?

A. Yes, sir, but in addition to that——

Q. (Interposing.) I haven't said anything about a "but", now. It is just about the same, isn't it?

Mr. STEFFEN. Let the witness finish his answer.

The WITNESS. The mark-up we get today is about the same as the carload discount that a jobber received.

By Mr. BROMLEY.

Q. So that do I understand you to say that a concern like yours, when it buys board from a manufacturer at  $12\frac{1}{2}$  per cent discount, and resells at the dealer price, is a jobber because it makes  $12\frac{1}{2}$  per cent; but when it buys from the manufacturer at the dealer price and sells at a  $12\frac{1}{2}$  per cent mark-up, although it makes the same profit it nevertheless is not a jobber?

A. There is a difference——

Q. (Interposing.) There seems, sir, to be no difference to me.

Mr. STEFFEN. Let the witness complete his answer to the question, please.

The WITNESS. The discount to a jobber is applied  
2774 to carload and truckload lots. In small lots a warehouse charge was still placed on warehouse pick-ups. So that if we had a jobber's profit of ten per cent we would still, on small lots, charge 12 per cent, or approximately 12 per cent, to cover our handling and overhead out of our Detroit yard. If we had a lot of volume at 12 per cent we could make money. As a convenience item, 12 per cent just about breaks us even.

By Mr. BROMLEY.

Q. Isn't the reason that purchasers from Quality Materials Company, your company, in Detroit, pay a mark-up over the prevailing dealer price, because they get a real valuable service from you?

A. That is true, sir.

Q. And isn't the test of whether a man is a jobber or not, just that, that is to say, whether or not he renders a service to the dealer purchaser?

A. We wouldn't be in business very long, Mr. Bromley, if we handled all of our merchandise on that margin.



Q. Well, won't you admit that your Detroit operation is a kind of a jobbing operation?

A. It is a jobbing operation but on those particular items I would say that it is a warehouse operation. We buy at the same price as the dealer, but the dealer buys from us only because he doesn't want to take in a truckload or a carload.

2775 Q. Therefore you extend to him an accommodation which is of value to him and you can charge him more than the dealer price?

A. That is correct.

Q. And that "more" that you charge him is the profit which you make?

A. It is the gross profit, yes, sir.

Q. All right, gross profit, sure. Well, gross profit is always the difference between the price at which you buy and the price at which you sell, isn't it?

A. Yes, sir.

Q. Now if you bought that board at a discount of 12½ per cent, and sold it at the dealer price, your gross profit would be 12½ per cent, wouldn't it?

A. But we wouldn't do it.

Q. Won't you answer my question. You used to do it, didn't you?

A. Not on small lots.

Q. Well, on any lots?

A. That discount applied on carload or truckload lots.

Q. Well, if you bought board at a discount of 12½ per cent, your gross profit was the 12½ per cent, wasn't it?

A. That is correct.

Justice STEPHENS. Have you a number of other questions, Mr. Bromley? One of the judges, Judge Jackson, has an appointment which he must keep promptly at 4:30. So if your examination is going to cover some moments, we had better adjourn now.

Mr. BROMLEY. I am not quite through.

Justice JACKSON. What time does your plane leave tomorrow, sir?

The WITNESS. I am leaving Friday, sir.

Justice STEPHENS. With respect to plans for tomorrow, you are not going to call another witness after this witness is completed, are you?

Mr. STEFFEN. We had Mr. Tomkins all arranged for tomorrow, but after our discussion of yesterday—

Justice STEPHENS. We stated last night that after these witnesses were disposed of—so that we wouldn't have to

postpone these reserved rulings any more—we would have an argument and then recess. What I was about to say is that we hope counsel will be prepared tomorrow, after the conclusion of the examination of this witness, to make an argument on this question of the reserved rulings.

You may announce a recess until tomorrow morning at ten o'clock.

Mr. O'DONNELL. Your Honor, do I understand that we will then adjourn until Monday morning, at which time Mr. Tomkins will be needed?

Justice STEPHENS. We will rule on that tomorrow.

2777 Mr. O'DONNELL. Mr. Tomkins is very actively engaged in war work—

Justice STEPHENS (interposing). He is not to be here tomorrow and it seems likely at the moment that we will not call him until Monday morning. I think that is probable, but we will be more definite after the argument tomorrow.

Mr. O'DONNELL. I would like to give him as much advance notice as I possibly can.

Justice STEPHENS. You will know tomorrow. I think the great probability is that he will not be needed until Monday because we will have to hear this argument and then we want to examine the authorities and have a conference among the judges on these reserved rulings, and there are a great many of them to go over—so I think the great probability is that he will not be needed here until Monday morning.

We will now recess until ten o'clock tomorrow morning.

(Whereupon, at 4:00 o'clock, p.m., the hearing was recessed until 10:00 o'clock, a.m., Thursday, January 20, 1944.)

2778 In the District Court of the United States  
For the District of Columbia

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY;

OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

Washington, D. C., Thursday, January 20, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted, and the additional appearance of KENNETH R. LINDSAY, on behalf of the United States.)

2786 Thereupon, CHARLES A. HIGGINS, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

CROSS-EXAMINATION (resumed)

The WITNESS. What I meant to say or convey—it is hard to keep quiet—was that the results of my field contacts were cleared through Mr. Burley.

I think Judge Garrett had the point, that the sentence did not make sense because my field contacts could not have been with Mr. Burley, but the results of my contacts were cleared through Mr. Burley. That is what I meant to say.

Justice STEPHENS. Thank you.

Make no correction besides his explanation. Leave his explanation in the record.

Mr. STEFFEN. At this time I would like to introduce my colleague, Mr. Kenneth R. Lindsay, who has worked with us in this case.

Justice STEPHENS. You are welcome here, Mr. Lindsay.

Mr. BROMLEY. May the Marshal hand the witness a copy of the transcript for yesterday afternoon?

(Transcript of afternoon session of January 19, 1944, handed to the witness.)

By Mr. BROMLEY.

2787 Q. Will you please turn to page 3047, Mr. Witness?

A. Yes, sir.

Q. I direct your attention to the question beginning at line 8:

"Q. Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?"

and to your answer:

"A. The fact that he was selling at \$1.50 lower per thousand square feet to the same class of trade that we were soliciting . . ."—shouldn't that be "they"?

A. No, sir; that we, as the National Gypsum Company, were soliciting the other dealers, is what I meant to convey by that, the other dealers in the market.

Justice STEPHENS. That is, you meant to apply the word "we" to the National Gypsum Company and other manufacturers?

The WITNESS. To the same class of trade that we were soliciting. In other words, the National Gypsum Company was soliciting the business of the other 49 dealers, who had received a price bulletin from Dwight Hinckley quoting \$1.50 lower price.

By Mr. BROMLEY.

Q. But look at the rest of your answer. Don't you see that you say: ". . . and they, on the same brand of board, were therefore out of line and unable to get the 2788 business." That "they" refers to the 49 or so other dealer-customers?

A. That is correct, sir. That is what I meant to convey.

Q. But having used the word "they" in the next to the last line of your answer, line 13, doesn't that indicate to you that you intended to use the word "they" instead of "we" in the preceding line?

A. No. We were soliciting those 49 dealers and they, in attempting to sell the same brand of board, were out of line.

Justice JACKSON. Does that "they" refer to Hinckley?

The WITNESS. No, sir, to the other dealers in the market.

Justice JACKSON. I see.

Justice STEPHENS. When you say the other dealers were out of line, you remind me of the story of the old lady who said that all the Army was out of step except her son. It was Hinckley who was out of line, wasn't it?

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. Mr. Higgins, look at the bottom of page 3046, the last question. I said to you:

"Hinckley being in competition with your other dealer-customers, was underselling them to the same class of trade that they were selling the National patented board 2789 to, is that right?"



And your answer was:

"That is correct."

Now the reference in that question was to contractors. Your dealer-customers were selling contractors, weren't they?

A. That is true, sir.

Q. And as you told us yesterday, Hinckley was selling contractors?

A. And other dealers.

Q. You said house wreckers.

A. But they were in the dealer classification.

Q. I will come to that in a minute. But Hinckley and your 49 other dealer-customers were both selling contractors?

A. That is true, sir.

Q. Then at the top of page 3047, I said:

"And they came to you and complained about it?"

Now that means your 49 other dealer-customers, doesn't it?

A. That is right, sir.

Q. And then skipping the next question and answer, I then asked you:

"Now I would like to know just what the complaint was that these forty-nine or so other dealer-customers of yours made to you about what Hinckley was doing?"

Now isn't it a fact that what the 49 dealer-customers of yours were complaining about was that

Hinckley was selling contractors at a price lower than the 49 could afford to sell at?

A. No, sir. What I meant to convey was that the dealers that were buying in, say, carload quantities, questioned our activities with Dwight Hinckley Lumber Company, and how he could quote other dealers \$1.50 lower. His published quotation was not to contractors, it was to the other dealers in the market. And in order to make it embarrassing for the National Gypsum Company, he sent his quotation to all of the dealers, including the ones that he knew he had absolutely no chance to sell. That is what I meant to convey by that answer.

Q. So that he sent his quotations not merely to the house wreckers, but to all the dealers?

A. All the dealers in the Cleveland market.

Q. Now didn't he make the same low offer to his contractor customers?

A. I am not familiar with his contractor contacts.

Q. Now at page 3005—

Justice STEPHENS (interposing). That is in the morning session, isn't it?

Mr. BROMLEY. Yes, Your Honor.

By Mr. BROMLEY.

Q. (Continuing.) —in line 4, near the end, 2791 there appears the word "police". Did you use that word in your answer?

A. Yes, sir.

Q. What did you mean by it?

A. The word "police" is used, let's say, by sales managers, as a lazy method of explaining what their salesmen do. It refers to a policeman covering his beat, like the salesman is covering his territory.

Q. And you did not use it in any sense of discipline?

A. No, sir.

Q. Will you turn to page 3013, please?

Justice STEPHENS. That is in the afternoon session, Mr. Higgins.

The WITNESS. Yes, sir.

By Mr. BROMLEY.

Q. Rather, turn back to 3012, the question beginning at line 17, "Can you state to the Court what the nature of the complaint was against National as respects the Dwight Hinckley account?"

And then Mr. Steffen calls your attention to Exhibit 339, which was the Board Survey letter to National. And over the page, beginning at line 3, you said:

"The Dwight Hinckley Lumber Company was accused of selling plaster wallboard and gypsum lath below the dealer carload price."

2792 Isn't it a fact, as you said yesterday, that the complaint which USG wrote to National was an accusation against National, charging that National had violated the USG price bulletins in its sales to Dwight Hinckley?

A. May I have that question again, Mr. Bromley?

Mr. BROMLEY. Will you read it?

(The question was read by the reporter.)

The WITNESS. That is right.

By Mr. BROMLEY.

Q. And the reference to what Dwight Hinckley was doing was merely by way of pointing to evidence, that is to say, if Dwight Hinckley was selling at a low price, the reasonable inference was that National was selling to Dwight Hinckley at a price which was below the bulletin price?

A. That was the inference at the time, yes, sir.

Q. So that it is a fact, isn't it, that USG's accusation against National of a violation of the price bulletin, was based on the same kind of evidence which caused the dealers to come to you and complain, and accuse you of making a low price to Dwight Hinckley?

A. Well, I don't know what basis their letter was based on, Mr. Bromley. That would be an assumption on my part.

Q. Well, the letter, Exhibit 339, refers specifically to the fact that USG or Board Survey had been informed 2793 that Hinckley was selling at a low price?

A. That is true, sir.

Q. And that is what you and I have referred to as the evidence which caused USG to accuse National of violating the price bulletins?

A. That was the basis of my whole investigation of Dwight Hinckley's activities.

Q. That was the same evidence which caused your 49 dealer-customers to come to you and say, "What are you doing with Hinckley, selling him lower than you are to us?"

A. That is true, sir.

Q. And then on the same page, 3013, in line 11, still referring to Dwight Hinckley, you gave this answer:

"They were selling to dealers in Greater Cleveland."

Now as you said yesterday, the normal course of their business was to sell only to house wrecker dealers?

A. That is right, sir. The other dealers used Dwight Hinckley's facilities only in an emergency or when it was economic for them, being in a certain part of town, to pick up from their warehouse.

Q. And as you said yesterday, the other part, the bulk of Dwight Hinckley's business, was sales to contractors or consumers—you said industrials?

A. Yes, sir.

Q. That is consumers or contractors?

2794 A. That is true.

Q. At page 2973, beginning at line 16:

"Q. And did your competitors use the same price?"

"A. Well, to the best of my knowledge, because I did not see their price lists and we knew that we were getting business from our dealers, so we naturally had to assume that we were getting it on a competitive basis."

"Q. And by 'competitive basis', you mean what?"

"A. The same price."

Now didn't you intend, by those answers, to indicate merely that since you were getting business from dealers

in that area, you assumed that no one of your competitors had a lower price to those dealers than you had, for if your competitors had a lower price you would not have been able to get the business?

A. That is right, sir.

Q. On page 3014, beginning at line 14:

"Q. And that established or going dealer price was the USG bulletin price?

"A. I don't know about that; it was the National Gypsum bulletin price, as I had received it from Buffalo.

"Q. During that period?

"A. Yes.

"Q. And that was the uniform market price in that territory at that time?

2795 "A. Yes, sir."

Now when you used the word "uniform", didn't you mean "current"?

A. Yes, sir; current, going price.

Q. You didn't know, as a matter of fact, what the prices of your competitors were. You just assumed that they were selling at the current price?

A. Well, I don't know whether it would be called an assumption, Mr. Bromley. The building materials dealers and the lumber dealers don't hesitate very long if your price is out of line, and they are buying from you, to let you know that you are out of line. Not having received any complaints of lower quotations, we assumed that our quotations were in line with those of our competition.

Q. Early in your direct-examination, you referred to the one jobber which National was selling in the Cleveland area when you came into the business, I think, back in 1930, and prior thereto, and you said that in 1930 National's price to Toledo, on board, was raised to the dealer price; do you recall that?

A. Yes, sir.

Q. It is a fact, isn't it, that after that time, in 1930, National continued to sell other gypsum products, including plaster, at a discount, to the Toledo Company?

A. That is true, sir.

2796 Mr. BROMLEY. That is all.

Justice STEPHENS. Any further cross-examination by other defendants?

Mr. ADAMS. No, sir.

Mr. FINCK. No, sir.

Justice STEPHENS. Any re-direct-examination?

Mr. STEFFEN. I have just a few questions, Your Honor.



## REDIRECT EXAMINATION

Mr. STEFFEN. I would like to have the witness shown Government's Exhibit 340.

(Exhibit No. 340 handed to the witness.)

By Mr. STEFFEN.

Q. What is meant by the word "Chicago", Mr. Higgins, in the first line of that context?

A. In my correspondence I generally referred, when I mentioned the word "Chicago", to the United States Gypsum Company.

Q. And you would understand that to be a reference to the United States Gypsum Company?

A. That was undoubtedly what I meant when I wrote that note.

Q. Now I think you described yesterday something concerning the warehousing problem in Cleveland, and in Port Clinton, and testified that at this time the only way you, National, could establish a warehouse in that area  
2797 would be to put one up in Port Clinton; is that correct?

A. Either put one up or rent one, sir.

Q. At Port Clinton?

A. Yes, sir.

Q. And unless you were to do that, you were at a competitive disadvantage with USG and the American Gypsum Company, who were selling in the Cleveland market?

A. At that time, yes, sir.

Q. And you predict here on the foot of the exhibit that 90 days after the Dwight Hinckley matter is settled, you will still have that Port Clinton matter.

Was that correct, or did the Port Clinton matter get straightened out?

A. Well, I don't probably understand your interpretation of "straightened out".

Q. Well, I will ask you this question: As I understand it, pick-ups were allowed at Port Clinton warehouses of the manufacturers at this time?

A. Yes, sir.

Q. And they were in what size of truckloads?

A. I don't think there was any restriction for a certain period of time, and I may be wrong in that statement. That is to the best of my knowledge.

Q. And that was what really put you at a competitive disadvantage, is that correct?

2798 A. That is the way I figured it, yes, sir.

Q. And was that pick-up practice abandoned following this Dwight Hinckley matter?

A. Well, the Dwight Hinckley matter may have been incidental, and have had nothing to do with it, but the pick-ups at Port Clinton were abolished sometime after—how long after, I don't know.

Q. About Dwight Hinckley, did he get another source of supply after you had discontinued selling him?

A. We didn't really discontinue selling Dwight Hinckley. Dwight Hinckley, in the final analysis, just refused to buy from us because we criticized his market activities.

Q. I see.

A. But he had another source of supply for which he got, or rather received, the going price, and continued to embarrass us as long as he could drag out our trade-name at a lower price.

Q. And did he, after this time, sell at the going price in the market?

A. Yes, sir.

Mr. STEFFEN. That is all, Your Honor.

Justice STEPHENS. Any re-cross-examination?

Mr. BROMLEY. Just one question, if the Court please.

#### RECROSS EXAMINATION

By Mr. BROMLEY:

2799 Q. You said just now that pick-ups were allowed at the Port Clinton mills. Isn't it a fact that what you meant to say was that no extra charge was made by those manufacturers for the privilege to dealers of being allowed to pick up at the mills?

A. Yes, sir. What I meant to convey was the fact that a dealer could pick up—and I do not remember as to quantity—but he could pick up at the going carload price at that time.

Q. That is, there was no price increase for that kind of a service, so far as the price to the dealer was concerned?

A. That is what I meant to convey, sir.

Q. And it would be usual, in the gypsum business at that time, for a manufacturer selling to a dealer to charge him more than the dealer price if the manufacturer permitted the dealer to come to the mill and pick up the material?

A. That is customary at most mills, in order to discourage small pick-ups.

Q. That practice on the part of manufacturers, of permitting dealers to come to the mills and pick up small quantities, is an annoyance to the manufacturer and a source of extra expense to him, isn't it?

A. I don't know, but they have always said it has been.

Q. Well, you can understand that if that kind of 2800 business gets to any volume, the manufacturer has got to have loading platforms, places for the trucks to come in to, and men on the loading platforms to service the trucks of the dealers that come in, can't you?

A. There is no industry that I know of that solicits or wants the small pick-up business at their plant.

Q. That is true of all industries, isn't it?

A. In the ones that I know of, it is.

Q. And isn't that because it is an additional annoyance and expense to the manufacturers in all industries?

A. Yes, sir.

Q. When you told Mr. Steffen, then, that sometime subsequent to this time pick-ups were abolished, what you meant to say was that they weren't abolished at all, but the price to the dealer was increased by a slight additional charge for this kind of pick-up business; isn't that so?

A. For the time being, there was a penalty placed to discourage the pick-up business, and the minimum quantity picked up, I think, was increased to a truckload.

Mr. BROMLEY. That is all.

Justice STEPHENS. I would like to ask you one or two questions, Mr. Higgins.

I don't quite understand yet—I am sorry if I am dull about it—the nature of this competitive disadvantage, because as I read your testimony in the record last 2801 night, I understood you to say that it was not due to the freight differential occasioned by the 250-mile haul which you had to undergo, or USG had to undergo,—which was it, USG or National?

The WITNESS. National.

Justice STEPHENS (continuing). —but if the competitive disadvantage you were at with respect to dealers in this Cleveland area wasn't due to the freight differential, why couldn't those dealers come and get from you as conveniently as they could from these pick-up mills at Port Clinton? I just don't understand. Perhaps I am dull about it.

The WITNESS. My understanding of our operation in the Cleveland area, operating under the license agreement, was that it did not allow National Gypsum Company to have a warehouse in Cleveland at which we could sell at the same

price that dealers could pick up at Port Clinton. We would have to ship into Cleveland and charge an in-and-out, or a warehouse charge; and that warehouse charge may or may not have been subject to examination where it would not come under the heading of, let's say, a finagler, which is a common term in selling. In other words, it would have had to have been a reasonable mark-up, that would still have made it more attractive for the dealers to pick up at Port Clinton.

Justice STEPHENS. In short, since you didn't have 2802 a warehouse there yourself, you would have had to warehouse the small-lot items and charge that warehouse charge to your dealers, and therefore would have charged them more than they could get the same material for at Port Clinton?

The WITNESS. That is true.

Justice STEPHENS. Why didn't you have a warehouse there?

The WITNESS. The interpretation, as I discussed it with Mr. Burley—

Mr. BROMLEY (interposing). I object to this as hearsay.

Mr. STEFFEN. I insist upon this.

Mr. BROMLEY. The bulletins are in evidence.

Justice STEPHENS. It depends on whether he knows.

The WITNESS. I asked to have a warehouse in the City of Cleveland, and I was told—

Justice STEPHENS (interposing). Don't say what you were told. All I am trying to find out is—was there some policy on the part of your company, business policy or other, as a result of which you didn't have a warehouse in Cleveland, if you know?

The WITNESS. Yes, sir. We did not have a warehouse in any of the area in which I operated.

Justice STEPHENS. The Court doesn't mean to touch upon subjects that perhaps aren't within the issues, but 2803 I am trying to get the whole thing clear in my mind.

The WITNESS. At any time, which was in the middle of 1932, the building cycle was in a very low ebb, and even the large dealers were attracted to the benefits of keeping a large inventory by having small pick-ups available where they could keep a balanced inventory without being subjected to, at that time, the penalty of buying in carload lots.

We were losing our customers due to the fact that their inventories were probably one-quarter of what they would carry in so-called ordinary times.



Justice STEPHENS. Your customers' inventories?

The WITNESS. Yes, sir.

Justice STEPHENS. Now one other question on a different topic.

You used the phrase several times, in answer to questions propounded by Mr. Bromley, that prices were out of line. What do you mean by that phrase?

The WITNESS. A price out of line is a price that is not as low as the lowest price or the lowest competitive price, all other things being equal, in a market. And by "all other things being equal", I mean quality and ability to service.

Justice STEPHENS. Thank you.

Perhaps counsel now each ought to be allowed to conduct a cross-examination of the Court's direct examination.

(Laughter.)

2804 Mr. BROMLEY. In connection with Your Honor's question to the witness, I want to make sure that the Court understands this to be the fact, and it is the fact, isn't it, Mr. Witness, that the Port Clinton mills of USG and American were very close to Cleveland in comparison with your National mill, which was very far away?

The WITNESS. Port Clinton being only about 60 or 65 miles from Cleveland, while our Clarence Center mill was almost 250 miles and our National City would be about 400 miles.

By Mr. BROMLEY.

Q. So that, while a dealer might send his own truck from the Cleveland area to Port Clinton, it was unthinkable that he could send his truck from Cleveland to your Clarence Center or National City mills?

A. That is correct.

Q. Because the expense to the dealer of sending his truck so much further than the distance from Cleveland to Port Clinton would have made the operation prohibitive for the dealer?

A. That is true.

Justice STEPHENS. Just one other question on the part of the Court.

I understand that you mean to indicate that during this depressed period in 1932, concerning which you are  
2805 talking, your customers were trying to keep their inventories very low?

The WITNESS. Yes.

Justice STEPHENS. Do you mean to suggest by that, that that was one of the reasons why you didn't have a ware-

house, because you couldn't afford to have a warehouse stocking large quantities yourself because your dealers weren't calling on you for large quantities?

The WITNESS. No, sir, all I knew was that the policy of our Buffalo office would not allow me to open a warehouse in the Central Area.

Justice STEPHENS. I see.

Mr. STEFFEN. I want to ask one question on inventory.

#### REDIRECT EXAMINATION

By Mr. STEFFEN.

Q. You, as I understand it, sold in carload lots in the Cleveland territory?

A. Yes, sir.

Q. And were you allowed to sell in less than carload lots?

Mr. BROMLEY. I don't know what he means by the word "allowed". I object to that as calling for a conclusion.

By Mr. STEFFEN.

Q. Did you sell in less than carload lots?

A. Our sales were all in carload or pool-car lots.

2806 Q. What tendency did that have to build up a large inventory with the dealer?

A. Well, in plaster wallboard—at that time we were making a board  $\frac{1}{4}$  of an inch thick and a board  $\frac{3}{8}$  of an inch thick, and it was sold in lengths of 6, 7, 8, 9, and 10 feet. A dealer could buy a carload of  $\frac{1}{4}$  inch board and  $\frac{3}{8}$ . He had 8 different units or possibilities, 8 different piles.

Let's assume that he ordered a carload, and had a reasonable confidence in the crystal ball into which he had to gaze, to see which would move out first, and he found that his 4 x 8's had moved out and the rest of his inventory was still intact, and then he was forced to order a carload or a pool-car with someone else in order to bring his inventory up to balance.

Q. That is, if he were to order from National?

A. Yes.

Q. But if he could go to the mill and pick up 4 x 8's in small quantities, that would put you at a definite competitive disadvantage; is that right?

A. Yes, sir.

Justice STEPHENS. If there are no other questions, you are excused, Mr. Higgins. Thank you for attending the Court and helping us.

The WITNESS. Thank you, sir.

(Witness excused.)

2807 Justice STEPHENS. We will take a few minutes recess before proceeding with the argument.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2808 Justice STEPHENS. I suppose one may debate as to who should have the opening in such an argument as this. The Government is offering the evidence and in that sense possibly the burden is upon them to open. On the other hand, the defendants are making the motion to strike, and perhaps, as it is their motion, they should have the burden. But we will cut the Gordian knot and ask the Government to open and the defendants to reply.

You may proceed.

I may say, Mr. Steffen, in order not to interrupt you too much with questions, that I have read—and I think my colleagues have read—both briefs, now. We haven't had a chance to examine all the authorities yet in the defendants' brief. We have examined the authorities in the Government's brief.

There are one or two questions which come to my mind that I will mention at the outset so that you can discuss them as you go along, if you wish to.

As I understand the Government's argument with respect to this "bought and sold" board, as distinguished from board manufactured, or purported to be manufactured under the licenses, the Government's contention in the first place is that the fixing of prices on that "bought and sold" board is within the charges in the complaint, and would therefore be subject to restraint under the prayer.

But the Government makes the second contention  
2809 that even if it is not within the charges in the complaint, the fact that prices were fixed on board which the defendants bought from each other is introducible in evidence to show that prices were fixed upon the board manufactured or purported to be manufactured under the licenses. That seems to be the second point that you make.

Now as to the first point, I have one question. As I understand the Government's argument, the contention is that although the complaint is rather specific in spelling out the means and effects and methods by which the alleged conspiracy was carried into effect, the Government need not be bound by that or by the bill of particulars, that that is a general guide only, and that the Government may introduce other items even though not mentioned.

One of the problems that arose in my mind in considering the Government's argument was that the Government cites authorities to the effect that a cause of action can be

stated under the Sherman Act in the words of the statute. I think the *Jelke* case doesn't quite hold that. It adds that the allegations must be sufficiently specific to inform the defendants what they are charged with. But assuming that to be the holding in the cases, that it is sufficient to describe the offense in the words of the statute, that doesn't seem to me wholly to answer the question because the question before us here is not whether the complaint states

2810 a cause of action, good as against general demurrer, but the question is whether or not, as a matter of fair pleading, the defendants have been advised of a specific conspiracy which they are expected to meet, and no other.

A second question that arises in my mind with respect to the Government's argument, concerning the bill of particulars, is that as I understand the contention being made now, the Government regards itself as not bound by the allegations in the complaint or in the bill of particulars; but, the Government argued, in a brief which it submitted in connection with this point, which brief was prepared and submitted by Mr. Kelleher, Mr. Haddock and Mr. Hickey, at the time the Government resisted the application for a bill of particulars, that a bill of particulars ought not be required because the Government would be bound by it, and it cited a number of authorities to that effect. They appear in this brief which you filed with us, and there is a substantial portion of the brief which contends that once a bill of particulars is filed, that specifically binds the Government to the statements made in the bill of particulars.

The two positions seem inconsistent and we are consequently puzzled by it. Consistency may be a bug-bear of small minds, but when we are dealing with a complaint we ought to know whether the law is this or that so far as this particular case is concerned.

2811 Another question that I would like to have you discuss is this. If I understand your contentions correctly, you assert that the defendants are charged with the natural consequences of their acts; that they could not sell board manufactured under the patents, or purported to be manufactured under the patents, at agreed prices unless they also sold their other board under the same price list; and that consequently, you are entitled to go into the whole thing and show all of the economic consequences and effects of the whole proceeding.

Now there again I am a little puzzled by this problem. This case is already a very complicated case, the issues are highly complex and detailed and we ought not extend



it unless it is necessary in fairness to the Government's case to do so.

If it turns out to be the view of the Court, after we have heard the whole case, that the price fixing under the agreements was illegal and must be restrained, it would seem to follow that the economic consequences of price fixing on board not manufactured under the licenses would also fall to pieces because if the defendants cannot fix prices on board manufactured under the licenses, obviously the competitive situation would be restored and all of the good that the Government claims it has a right to accomplish under the case would be accomplished by striking down the license agreements. Therefore it would seem that in that  
2812 sense it would be unnecessary to go into the ramifications of these economic consequences.

On the other hand, if it should turn out to be the view of the Court that on the whole of the evidence in the case, the license agreements are not illegal, then the economic consequences which follow from that legal price fixing cannot be helped and would not be illegal.

So why is it necessary to carry the Court into this wide excursion into the agreement or alleged agreement to fix prices, or the actuality of "in line" prices on the "bought and sold" board or on perforated lath or on unpatented products, or all of these other items? Isn't it, after all, an unnecessary inquiry?

I shall have some questions to ask the defendants when they rise to their argument. I mention these in advance so that if you think they are of any pertinence, you may discuss them.

Mr. STEFFEN. It might help if you were to ask the defendants also at this time, or would you prefer to defer your requests as to them?

Justice STEPHENS. It doesn't make any difference to me. The reason I ask them at this time is because I did not want to interrupt you too much, and I think counsel are entitled to know the questions which arise in the Court's mind.

My mind is utterly free of any preconception on  
2813 the question, we don't know what the answer is. We simply have these questions in our mind. We will ask the questions of the defendants later.

Mr. STEFFEN. All right.

We have a formal set of Offers of Proof, which are identical with the offers printed in the appendix to our brief.

Justice STEPHENS. We have read those.

Mr. STEFFEN. And if, as a matter of formality, they should be submitted, we have them here and will present them at this time.

Justice STEPHEN. Yes, they should be presented and made a matter of record.

(Thereupon, the document referred to was handed to the Clerk of the Court.)

Justice STEPHENS. The court reporter is directed to copy into the transcript the Offers of Proof which are in the possession of the Clerk, but they should also be filed with the Clerk.

(The document referred to is as follows:)

2814 In the District Court of the United States  
For the District of Columbia.

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM CO. ET AL., DEFENDANTS

*Offer of proof*

Pursuant to the ruling of the Court heretofore made on December 15, 1943 (Tr. p. 2201), counsel for the plaintiff submits the following:

*Offer No. 1*

We offer Gov't. Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U.S.G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board at prices fixed by U. S. G. under the license agreement of October 15, 1929, between U. S. G., and Certain-teed, Gov't. Ex. 10;—all this for the purpose of showing, or as tending to show, the nature and  
2815 extent of the commerce which the parties have conducted under *contracts* in restraint of trade in violation of Section 1 of the Sherman Act as charged in par. 44 of the complaint.

*Offer No. 2*

We offer Gov't Ex. Nos. 241, 274, 275, 276 and 277 to show: that Certain-teed has contracted to buy substantial

quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, the *combination and conspiracy* in restraint of trade in violation of Section 1 of the Sherman Act as charged in par. 44 of the complaint.

*Offer No. 3*

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, that the defendants have *monopolized* trade and commerce in gypsum board and gypsum products in violation of Section 2 of the Sherman Act as charged in par. 44 of the complaint.

*Offer No. 4*

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, that the defendants have *attempted to monopolize* and have been engaged in a *conspiracy to monopolize* trade and commerce in gypsum board and other gypsum products in violation of Section 2 of the Sherman Act as charged in par. 44 of the complaint.

*Offer No. 5*

We offer Gov't Ex. Nos. 241, 274, 275, 276, and 277 to show: that Certain-teed has contracted to buy substantial quantities of gypsum board and other gypsum products from U. S. G.; to be followed by proof that Certain-

2817 teed actually bought board and other gypsum products in substantial quantities from U. S. G. under such contracts; and this to be followed by proof that Certain-teed resold such gypsum board and other gypsum products at arbitrary and non-competitive prices;—all this for the purpose of showing, or as tending to show, the *combination and conspiracy* in restraint of trade in violation of Section 3 of the Sherman Act as charged in par. 44 of the complaint.

Dated: January 17, 1944.

/s/ ROSCOE T. STEFFEN,

/s/ EDWARD KNUFF,

*Special Assistant to the Attorney General,*

/s/ FRANCIS R. SHIELDS,

/s/ KENNETH R. LINDSAY,

*Special Attorneys.*

WENDELL BERGE,

*Assistant Attorney General*

*Argument on behalf of the United States*

By ROSCOE T. STEFFEN

Mr. STEFFEN. Your Honor spoke earlier this week, I think, concerning the fact that our offers had to do only with the C. O. Brown exhibits. We were quite aware that there were many other reserved rulings. However, in order to present the matter as simply and as clearly  
2818 as possible, we took the case that had first come up, and would like to have it reasoned from that basis, and I think the decision there will control a number of the other reserved rulings.

The only one that occurs to me as being definitely different from the C. O. Brown situation is the one that came up yesterday afternoon in connection with Mr. Higgins, when he was asked concerning the sale of perforated lath by National in the Cleveland territory. That, I think, is a different case and should be argued separately.

If I may, your Honor, I should like to take up your Honor's questions, which I am grateful to have had you put to us, more or less as the argument proceeds, and I will endeavor to give our position on each of those points very carefully.

I want to say also that we regard the issue as rather an important one, not necessarily for this case, but inasmuch as it raises a close question on pleading, a pleading which the Department has thought was adequate over these many years, and that it is an issue which we would like to have



considered very carefully, because this complaint, as your Honors are quite well aware, is a complaint following the form which has been used by the Department substantially since the Sherman Act was adopted, about fifty years ago. We have used it both on the complaint side and on the indictment side, and the essence of a pleading, as we see it, on both sides is what we are charging an offense or a series of offenses under the Sherman Act and that, as Mr. Bromley has told the Court, is usually regarded as a criminal statute.

So, that the indictment pleading and the civil pleading will naturally follow a very similar form.

Now the reason that we have made five offers of proof is to show sharply that there is a series of statutory violations charged, that is, that there is a violation of the Sherman Act in that there were alleged to be illegal contracts in restraint of trade in gypsum products among the several States.

There is also a charge of conspiracy in restraint of trade.

There is also a charge of monopoly; and a conspiracy to monopolize.

Those are separate, legal offenses, and in paragraph 44 of the complaint each one of those is related, and stated in full, and it is our contention that paragraph 44 states a cause of action growing out of each of these separate provisions of the statute.

Now the defendants have pointed to the fact that we use the word "combination" in subsequent paragraphs of the complaint, and by "subsequent paragraphs" I mean from paragraph 45 to the end of the complaint. In order to get our discussion clear, I want to call your Honors' attention to page 10 of the complaint, and to the concluding sentence in paragraph 44, and I would like to have that carefully read so that we will understand what we are talking about.

It says that, "Said unlawful contract, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination."

Now that is not a very artful word, but what that says literally, and I think beyond misunderstanding, is that the word "combination", as it appears throughout this complaint from paragraph 44 on, means that it is inclusive of each of the separate violations—there is not just one combination.

We may, for example, be able to establish a conspiracy, but might not be able to establish a monopoly. The word

"combination", though, wherever it appears subsequently in the complaint, will refer to each of the separate violations of the statute.

Now I don't think that is too material, but it is important to note that the word "combination" is a word of art in this particular complaint.

Now let's look at the facts in the case that we have here, I mean in this bit of offered evidence. We offered to show by C. O. Brown, the witness, that the Certain-teed Products Corporation closed down—let's take its North Holston mill—closed down that mill, and for a period of years bought plasterboard and lath, and wallboard, from the United States Gypsum Company, and that they sold that board to their trade at the ordinary dealer prices.

2821 That is not, perhaps, all established in evidence, but that is what the offer is. We wanted to show that that bit of merchandise which was described in the complaint was sold by the Certain-teed Products Corporation at regular dealer prices. That would be at the prices, the same prices, as United States Gypsum Company fixed upon their patented board, so-called, where they had a right to fix prices according to their contention.

Now let's get the proportions here. The probabilities are that ninety or ninety-five per cent of the board—and I say that for purposes of argument only—that ninety per cent of the board that is sold in the country, in the Eastern area, is sold by manufacturers who have made it and are selling it out as part of their regular business.

We wanted to show that there was some other board, in addition to that, that was sold by manufacturers, that board being board which they purchased from another manufacturer, and that it likewise was sold at the regular market price.

Now I think my first argument should be to point out very clearly why and where we think that comes very definitely within the complaint, just as a matter of pleading.

Note that the first sentence of paragraph 44 says, that "Defendants are, and have been for many years last past, parties to contracts in restraint of trade and commerce in gypsum board, plaster, and miscellaneous gypsum products among the several States, in violation of Section 1  
2822 of the Sherman Antitrust Act."

Now that is very broad language. It refers to gypsum board, plaster, and miscellaneous gypsum prod-

ucts, and there is no misunderstanding about that, about what is meant by that.

The defendants in their motions for a bill of particulars, did not ask anything concerning what commerce was covered in paragraph 44. At a later point, I believe, in their motions, they asked what was meant by "miscellaneous gypsum products", and we told them what was meant by "miscellaneous gypsum products". So there is no misunderstanding that paragraph 44, as drawn, relates to all gypsum products.

When you look at the second sentence of that paragraph—I think I should best argue this from the standpoint of a conspiracy in restraint of trade—when you look at the second sentence it refers back to that said "commerce", that is to say, "Defendants are, and have been for many years last past, actively engaged in a continuing combination and conspiracy in restraint of trade and commerce in said gypsum products"—and the "said gypsum products" necessarily means what appears in the first sentence, that is, all gypsum board, plaster and miscellaneous gypsum products.

So that so far as the charge is concerned, of a conspiracy, it constitutes a charge that these defendants, all of them, have conspired to restrain trade in all gypsum products, and I might say parenthetically that that covers 2823 ers, of course, perforated lath as well as it does ordinary lath. Perforated lath, as Mr. Bromley told you, is no different than any other lath excepting that they put some holes in it. No one, I think, will contend that this excudes perforated lath, but it includes all gypsum products; and that includes lath, plaster board, and wallboard. So I think there is no question at all but what our charge is that the defendants have conspired to restrain trade in all gypsum products and certainly, so far as the C. O. Brown matter is concerned, that is clearly within that because they were buying a large part of ordinary gypsum board and gypsum lath, and they were reselling that, as we contend, at conspiracy prices.

Now we have cases, your Honor, which say that that is an adequate pleading of the offense. It is a charge of the offense in the terms of the statute and, I think, in a criminal pleading, the indictment may be very short. Take a murder indictment, or any of the indictments, and they are practically just a short statement. This is a statement of a crime, or charge of a crime, if you wish, although it is coming up on the civil side, under the Sherman Act, and

that has been regarded and the courts consistently state, as you pointed out in the Jelke case, for example, which we have followed and always assumed to be the law, that a charge in the terms of a statute is an adequate charge—

Justice STEPHENS (interposing). Doesn't the 2824 Jelke case go a little beyond that?

Mr. STEFFEN. I think so. I was just saying that we don't have to stand on that because here we have gone to great detail to amplify and give, in a narrative form, the means and methods by which this particular charge was carried out. The Jelke case carefully points out that there is a distinction between charging the offense and the means and methods which are to be introduced in evidence to show how the offense was carried out. And if you will note carefully, this is the only place where we have made a charge. This is the gist of the complaint. Under the new rules this is a statement of our claim against the defendants. So that would seem to be a complete pleading at that point, subject, of course, to the addition of a prayer at the conclusion of the pleading.

But now, let's carry it on further—

Justice STEPHENS (interposing). Let me just ask you this, since you are now talking about the Jelke case, I have read it with some pains, and it seems to say on page 275:

"An indictment is generally sufficient which charges a statutory crime substantially in the words of the statute, except in such cases where other precedents have been firmly established in analogous offenses at common law, or where such a charge would not fairly inform the accused of the nature of the charge preferred against him."

And in the next paragraph there is also an ex-  
2825 ception, "except also those cases where the conspiracy is to defraud the Government in a manner that would not permit of the defendants being fairly and reasonably informed of the character of the offense without such detailed statement of the means and the time and place being set forth".

Do you really contend that if you had nothing in this complaint except paragraph 44, and specified no items of commerce, no dates or places, no effects, means, consequences, or methods, that that would be good pleading?

Mr. STEFFEN. I wouldn't want to answer that, as Mr. Higgins says, categorically. I am not really required to in this case, and I don't think that the Department has ever



been required to because we never make such a pleading, we always go on in more detail. We have many statements in the cases which would indicate that that would be a good pleading.

Justice STEPHENS. The reason that I asked you the question, and interrupted you to do so, is that it seems to me to present one of the most important questions in your argument, and that is this. It is true that you do charge more, but as I understand your argument, and your present contention, the fact that you charge more is immaterial as a matter of fair pleading, because you could have charged less, and therefore you are not bound by what you did by going further?

Mr. STEFFEN. I want to say that we are completely bound by what we did further, but I doubt if we are bound  
2826 in the way that your Honor would construe it.

Justice STEPHENS. Well, as to how the Court would construe it is still an open question, Mr. Steffen.

Mr. STEFFEN. Well, I am sorry—

Justice STEPHENS (interposing). The Court, doesn't know how it is going to construe it. The question is a baffling and difficult one.

Mr. STEFFEN. Well, I should have said, then, as to how I believe the defendants would like to have the Court construe it.

Justice STEPHENS. That would be much more tactful.  
(Laughter.)

2827 Mr. STEFFEN. If I can make that very clear, we contend that paragraph 44 is a complete statement of a charge in the words of the statute, and that there are many dicta in the cases that that is sufficient. We can't point to anything further, because there has never been a case come up where they had only a charge in the words of the statute under a Sherman Act case. They have always gone on and explained in more detail how the matter was handled, how the combination was formed, and what effect the combination had—and from the sum-total of that there is some indication, and we have always thought, that a sufficient notice is given to the defendants of what is meant by the broad charge that "You have conspired to restrain trade in gypsum products."

Now I want to carry the argument through just a little further on the pleadings, to show what we feel has given the defendants complete notice of what we think is the case, and of the relevancy of this evidence under the pleadings.

Let's read paragraph 45, which is also a part of the complaint. Now paragraph 45—I think the second sentence is the only one in point at the moment—states that:

"Said companies have entered into, have carried out, and are carrying out said combination for the purpose, and with the effect,"—note these words—"of restraining, dominating, and controlling the manufacture and distribution of said gypsum products in the Eastern area . . ."

2828 Now that is a further specification, if you wish, or explanation, of the type of restraint which is to be found in this case. It says that the defendants have, in very broad terms—but a little more specific, perhaps, than in the charge in paragraph 44—that the defendants "have carried out, and are carrying out said combination for the purpose, and with the effect, of restraining, dominating, and controlling the manufacture and distribution of said gypsum products".

And as I have reasoned with you, "said gypsum products" is definitely all gypsum products, and under a monopoly charge it would be impossible to really prove a monopoly if you are limited to only certain gypsum products. I mean, it would certainly be a limited monopoly; and our purpose here is, under the charge, to show that all gypsum products are monopolized, or, as we say, there is a conspiracy in restraint of trade with respect to all gypsum products.

We state in paragraph 45, in the second sentence, that these defendants, all of them—that is USG with the rest—have combined for the purpose of dominating the market and of restraining trade in all gypsum products.

But we have got a much stronger paragraph, which is of the same character as paragraph 45, and I now refer you to paragraph—

Justice STEPHENS (interposing). Before you go 2829, beyond that, I want to follow every step of your argument.

In paragraph 45, when you say they are charged with combining for the purpose of "restraining, dominating, and controlling the manufacture and distribution of all gypsum products", the word "all" is not there. You refer to the word "said", I assume?

Mr. STEFFEN. That is correct.

Justice STEPHENS. And contend that the word "said", referring back to paragraph 44, means gypsum board, gypsum plaster, and miscellaneous gypsum products?

Mr. STEFFEN. Yes, and the next reference, I think, will make it very clear, Your Honor.

Justice STEPHENS. Thank you.

Mr. STEFFEN. Refer to paragraph 121. Note that paragraph 121 falls under a heading stating "The Effect of the Combination", and is all that the second sentence of paragraph 45 said, that the effects of the combination are thus and so.

Now let's read, because this is, I think, very important, read the first sentence of paragraph 121:

"By means of the combination,"—and when they say "combination" there, they mean conspiracy or monopoly or whatever the charges are in paragraph 44—"the defendants have controlled and dominated, for more than ten years, the manufacture and distribution of 100% 2830 of the gypsum board and 80% of the plaster and miscellaneous gypsum products manufactured and sold in the Eastern area and the defendants will, unless restrained, continue to dominate and control the manufacture and distribution of said gypsum products, at least until the year 1954 when the last of the U. S. G. patents on the foam process expires."

Now there is no indication there that that has to do with only some one type of board; and if you credit us with having charged a monopoly here, which paragraph 44 clearly does, in all gypsum products, this paragraph says that that monopoly is with the effect of controlling the distribution of 100% of the board sold in the Eastern area.

Now it doesn't say only board made by one and sold by one, it says all board sold. And by that they are referring to sales to dealers—I think there is no question on that—all board sold to dealers, or all board sold in the Eastern area, has been controlled and dominated by these defendants, as a group. And I think Your Honor's chart will show you that since 1929 we have just a limited group, there are no other companies. In fact, there are fewer companies in the business now than there were in 1929. The Atlantic Company and the Niagara Company and the Universal Company have all disappeared, so we have now a close monopoly, as we charge, of 7 companies which, according to paragraph 44 and according to paragraph 2831 121, are controlling the distribution of 100 percent of the gypsum board and plaster and miscellaneous products manufactured and sold in the Eastern area.

But we have even a better sentence. Take the next one, and let's read that carefully. The next sentence in paragraph 121—this has to do with prices—reads:

"Since the year 1929, all gypsum board sold by all manufacturers"—there is where the word "all" comes in with a vengeance—"and all manufacturing distributors in the Eastern area has been sold at uniform and non-competitive prices dictated by U. S. G., with a resultant elimination of all price competition in the distribution of gypsum board from manufacturers to dealers."

Now let me point out again that the defendants had a bill of particulars which had, I think, 73 paragraphs, and 165 sub-paragraphs, or demands, and they never asked a thing about the first or second sentence of 121. That was understood by them. They asked something with regard to the third sentence, which is immaterial for our present argument, because we are now saying that we have made a very careful charge of a monopoly or of a conspiracy relating to all gypsum products, all gypsum board.

We have stated in paragraph 45 that it was done with the purpose and effect of dominating and of restraining the manufacture and distribution of said board, or said gypsum products. We have added to that in more  
2832 detail in paragraph 121, and have said that they have dominated, since 1929, 100 percent of all board by whomever manufactured.

And in paragraph 121, the second sentence, that they have controlled the sale price of all board sold by all manufacturers throughout the Eastern area.

That seems to me to say, without any question, that we are able and entitled to show that this little bit of board that the Certain-teed people sold—maybe 5 percent of their business, we don't know how much—was sold by them as part of that 100 percent.

Now it isn't going to take much time, as we see it, to put that evidence on, because there isn't a great deal of it. But it is part of the Government's case, if we are going to show a general monopolization or a general conspiracy in restraint of all trade, to show that that board, along with all the other board, was sold at uniform prices.

Now when it is said that we can't point to any particular thing in the complaint which says that the North Holston plant was closed and that they bought some board from USG, and then sold that at bulletin prices, it is perfectly true we can't. There is nothing that specifically mentions North Holston in that transaction. But the defendants are under no doubts as to the fact that we have alleged that they have conspired to control 100 percent of the board marketed in the Eastern area. We have said that in  
2833 words which they didn't think were at all ambiguous,



and we stand on that. They didn't ask for an explanation of paragraph 44 in their bill of particulars, and they didn't ask for an explanation of paragraph 121, or of the first part of paragraph 121. The thing is clear.

Now let's look for just a moment at the means and methods that are alleged. We could make an academic contention, Your Honor, that that is enough for a complaint. We didn't stop there, we went ahead and told them just when they formed their combination or how they went about forming their combination; and in the first part, on page 11, beginning with paragraph 47, we have many paragraphs describing much of the evidence that has been presented here, indicating all the little details as to how they went about forming the combination.

Now Mr. Blagden and Mr. Griswold, and others, were active in the early days, endeavoring to get people together under the license agreements, and we have had testimony that they thought it might stabilize the business. The first exhibit we offered by Mr. Griswold was one that said that "According to the plans we now have, it should be possible to stabilize prices for 15 years."

Now that was all, as we see it, giving the defendants very clear notice of how this combination and conspiracy, or this monopoly, was brought about, and they haven't any doubts on how we intend to show that it was brought about.

Now taking the next main subdivision of the complaint, on page 22, I believe—

Justice STEPHENS (interposing). What is that last one to which you referred?

Mr. STEFFEN. On page 11, the formation of the combination.

Now on page 22, we speak of the operation of the combination, and in the following pages. And then, of course, what I have just been speaking of, on page 31, the effect of the combination.

Now you will note that they are all, those sub-headings—the formation, the operation, and effect—are all introduced by the sentence appearing in the last part of paragraph 46 on page 11, "The formation and operation of said combination is more fully set forth in paragraphs 47 to 120 hereof."

Now I call your attention again to the words "said combination". What they are meaning there is that the said combination, which are the various charges made in paragraph 44 of the complaint—and when we say the "said combination" we mean the said charges of conspiracy and

of monopoly and of contracts in violation—are more fully set forth in the remaining part of the complaint.

Now that, I think, brings us pretty clearly—I mean this particular bit of evidence—clearly within the complaint as drawn, without referring to anything else that has been discussed heretofore.

I wonder if that discussion, so far, has met Your Honor's question concerning "bought and sold" board as distinguished from board manufactured and sold, and the Government's contentions with respect to that? We appreciate Your Honor's position that we don't want to drag this case out and go into a lot of ramifications that are not necessary. We consider, however, that this is a relatively minor part of the case; so far as the commerce is concerned, it is only but a smaller portion, and it will not take much time.

But we insist, argumentatively, that the commerce with which this complaint is concerned includes all board, whether it is manufactured and sold by the particular licensee who sells it, or whether it is board which may be acquired one way or another.

I might say that we have some information that there has been perhaps a little—there may have been some borrowing back and forth between one and two, small amounts. That, of course, isn't described here, but it is still board.

But the gist of the complaint and the gravamen of the charge largely, I think, is that it is the dealer prices that have been fixed throughout this period. And it is prices on all board and all miscellaneous gypsum products. That is the price-fixing restraint, which we have made very clear in paragraph 121 when we say that all manufacturers have sold all board at fixed prices throughout the period.

Now on the matter of introducing other means which Your Honor spoke of, we would regard this proof of the board which the Certain-teed people bought as a small or relatively small amount of board bought by one company from another and sold at these prices. We don't think it will take long, and we don't regard it as going far afield—in fact, we feel it is squarely within the pleadings—it isn't going far afield to bring in something that constitutes a new charge. There are no new charges other than what appear in 44.

I think—well, I would like to stay with that set of facts, because I will get all tangled up if I go into a number of other purchases by companies. That gives a situation, though, which is indicative or typical of many others.

Now on Your Honor's question of fair pleading, we want this pleading to be absolutely fair, and I think that as far as my connection with this case is concerned, we have tried to be, straight through. And we don't feel that there has been anything at all—in fact, we have put our cards on the table absolutely from the very beginning—

Justice STEPHENS (interposing). By the use of the term "fair pleading", the Court was not suggesting that you had not intended to be fair. I was using that expression as a term of art, fair pleading in the sense of giving due notice to the opposite party.

Mr. STEFFEN. Thank you.

Now perhaps I should take up this reference made in the defendants' brief.

At the foot of page 3 they say: "The present position of the Government is in contrast with its argument on defendants' motion for a bill of particulars to the effect that the complaint set forth with clarity and particularity the entire charge against defendants. The court accepted this argument, presumably upon the ground that it was made in good faith,"—this is an insinuation that we are now arguing in bad faith—"and denied many of the particulars which defendants requested."

I don't want to go into personalities, but I want to insist very clearly that the position that we now take, as I understand it, is exactly the position that Mr. Kelleher took 3 years ago, or whatever time it was when the bill of particulars was argued.

And I want to call Your Honors' attention, in that connection, to certain language in our brief which was filed at the time that motion was argued.

At the top of page 19, we said:

"For the same reasons advanced by Mr. Justice Holmes the combination and conspiracy involved in the present case is insusceptible to detailed particularization. The reason is obvious. The conspiracy charged is alleged to have been a continuing one extending over a period of approximately fifteen years and involving a multitude of incidents, agreements, understandings and transactions. . . ."

That was to state, we felt very clearly that our charge, which was in paragraph 44, was a complete charge of a statutory violation, and that we were unable—I think the courts have always recognized that in a pleading of this sort it is impossible to set forth all of the means and methods and details—the defendants had their opportunity for a bill of particulars, and they requested 165 items.

2839 Most of those items had to do with language, whether we meant, when we mentioned "miscellaneous products"—what products we meant, and things of that sort.

If Your Honors will look through that bill of particulars and notice what the Court granted them, only twelve out of 165 were granted, and those were on matters which were, as we see it, merely explanatory of some of the ensuing paragraphs, not charges of the complaint.

And the charges of the complaint are, as we say, exactly now what they were then. So there has been no change in the position of the Government on that score.

Do I get that point over?

Justice JACKSON. We understand you all right.

Justice STEPHENS. We understand your contention.

I still am a little puzzled about this. It seems to me that the specification of means, methods and effects in your complaint isn't a recital of evidence. In other words, that part of your complaint which follows paragraphs 44 and 45, describing operation, effect and the like, isn't a specification of evidence; it couldn't properly be that because you are not supposed to plead evidence. It seems to me it isn't evidence. Your allegations of what was done, at these various meetings which were held, and conferences, leading up to the formation of the alleged combination, are in terms of ultimate fact. If you had been describing them in  
2840 terms of evidence, you would have had to have put in the words of the witnesses, and you would have had to describe the exhibits which you put in evidence. So what you have been alleging in the complaint and in the bill of particulars are ultimate facts descriptive of the combination or conspiracy which you are charging, and speaking for myself alone, what I had in mind was this—It is true that conspiracy is hard to define with particularity, it is true that a conspiracy at common law consists of the agreement, as far as the gravamen of the offense is concerned, but the human mind can hardly know what conspiracy one is charged with except as it is described by means, methods and effects.

Now as I studied the pleadings in the case, during all of the long period when we were having the preliminary motions and hearing the argument at that time, I got the impression that the conspiracy which you were charging was the conspiracy outlined in the complaint, and that it had to do only with price fixing through license agreements on board sold thereunder. Now that impression is not one which needs to prevail if I am mistaken about it.



The other problem that remains in my mind, if you wish to discuss it further—it would follow from the premise I have just made—if what you have described in the detail of your complaint subsequent to paragraphs 44 and 45 is not evidence, if it is a pleading of ultimate allegations of fact, then these new items, if to be treated as a part of your charge, if to be treated as a part of the conspiracy which you are seeking to restrain, would seem to be new items of ultimate fact, and perhaps if that were true, you ought to be asking to amend your pleading rather than to prove them before amending.

But, as I say, Mr. Steffen, I ask these questions only to be sure you have an opportunity to answer such questions as arise in my mind. I don't know what the answer is. We need help from both sides.

Mr. STEFFEN. I should like to make a reference to your first thought, that the conspiracy was restricted to price fixing under the licenses. I wouldn't be surprised but that, in some of our discussion, we casually referred to it that way, either the defense or the Government, and of course it is true, as I said here earlier, that the bulk of the board which was sold had been sold under the license agreements. So you could loosely say that that is the whole conspiracy.

But I want to make it very clear—and I think that paragraph 44, followed by paragraphs 45 and 121 indicate—that we intended to include all board whether under the license agreement or not.

Justice STEPHENS. Well, I think it is not unreasonable for me to have had that impression for this reason. We went through the motion to strike paragraph 46 (a), 2842 and the motion for summary judgment, and during all that discussion as I understood it, the essence of the Government's contentions and the defendants' contentions came down to this—and we have stated this in the preliminary description of the case in the opinion of the Court on the motion for summary judgment—that the Government was charging price fixing, standardization of products, elimination of jobbers, under license agreements; that the defendants admitted the license agreements and the price-fixing, but denied standardization and elimination of jobbers.

The Government made two rejoinders, first that the patents on which the license agreements were founded, were invalid; secondly, that even if they were not invalid, the terms and conditions of the license agreements were beyond the confines of the *General Electric* case. So it

seemed to me that the whole thing characterized itself in terms of those license agreements and price fixing and other arrangements made under them.

Mr. STEFFEN. Of course that, I think, is very understandable. We had not started with our basic case. We were meeting a defense which the defendants might put in when they pleaded the *General Electric* case. We said, "Even though you do plead the *General Electric* case as a defense, we don't think you come under that". That is where all our arguments under patents were concerned.

As we said, "In order to come within the *General Electric* case you ought to have a valid patent". Of course, if we could upset the license agreements we upset everything.

Now we start at the beginning of the case to show that the defendants have monopolized or attempted to monopolize or conspired to monopolize, or conspired to restrain all gypsum products.

Read paragraphs 45 (a), (b), (c), (d), and (e), and that indicates that we are referring to plaster and other products of that sort, particularly in 45 (c); and if you will look at paragraph 46, which is the one where we bring up this particular means, that is the use of the license agreements, we contend that that was merely a means whereby they stabilized and controlled the price on everything—and it says that. It says:

"Said combination was entered into and has been, and is being, carried out by the defendant companies in part under the guise of numerous license agreements purporting to relate", and so forth.

So that the case, I feel on the pleadings, is surely not one limited to showing that the license agreements are themselves illegal.

I think, as we state in our trial brief, that they are illegal, and if we fail to prove that they had been entered into, or that this whole conspiracy exists as to all commerce, and we fail to prove that the agreements were entered into as a subterfuge, we come down to the basic question of whether or not they are valid on their face.

But it is essential for a full presentation of our case that we show the whole commerce that is involved here.

Justice STEPHENS. Perhaps this question will point up the argument a little.

Suppose that the Court should reach the conclusion at the close of the evidence and argument in the case, that

the license agreements are within the proper limits of the *General Electric* case and are therefore not illegal; and that therefore price fixing under them was not illegal. And suppose the Court should come to the conclusion on the issues of fact with respect to the elimination of jobbers, and the standardization of products, that there wasn't any elimination of jobbers or standardization of products. Assume all that, and then answer this question:

Would you still contend that under this complaint you would be entitled to an injunction restraining the fixing of prices on board bought and sold by the defendants from each other, but not manufactured under the licenses?

I put it that way because it seems to me that that way of putting it nicely tests the question as to whether or not that is a part of your charge.

Mr. STEFFEN. I think so, and I would include not only board bought and sold, but all board and all products that come under the term "miscellaneous gypsum products".

Justice STEPHENS. I put it in terms of "bought and sold" because that points up the issue.

Mr. STEFFEN. That is right, that gives a good illustration. That is, we think the subject-matter of the commerce here is inclusive of all, and that the matter of the license agreements had to do merely with part of the commerce, a large part, true, but not all.

Justice STEPHENS. This is an appropriate point to take our noon recess.

(Thereupon, at 12:15 o'clock p.m. a recess was taken until 1:45 o'clock p.m. of the same day.)

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## AFTERNOON SESSION

(The trial was resumed at 1:45 o'clock p.m.)

Justice STEPHENS. You may proceed, Mr. Steffen.

*Argument on Behalf of the United States* (resumed)

By ROSCOE T. STEFFEN.

Mr. STEFFEN. I believe, your Honors, I have used forty-five minutes of my time, and I will only require a few more minutes.

Justice STEPHENS. In the course of your further comments, will you please comment upon your position with respect to the perforated lath manufactured by National, Celotex and Texas, who did not have, I think it was admitted, license contracts to manufacture that product? If you have any different contention with respect to that, than with respect to the other, we would like to know what it is.

Mr. STEFFEN. I will be glad to do that, your Honor. I thought that the defendants were making this motion to strike, and that perhaps they might have the honor of appearing first on that point.

Justice STEPHENS. Well, we can't be completely precise as to the order of opening and closing, this is all so inter-related.

Justice JACKSON. Your argument thus far, Mr. Steffen, is concerned with the offers to prove from 1 to 5, inclusive?

Mr. STEFFEN. Just that, and to show that, as we 2847 see it, it comes within the broad charges of paragraph 44, together with the explanations in paragraphs 45 and 121.

Justice STEPHENS. I think that there was also some reserved ruling with respect to Metal-A, was there not?

Mr. STEFFEN. I don't remember, your Honor.

Justice STEPHENS. I think so.

Mr. STEFFEN. We can check that on the record after your Honors' decision.

Mr. BROMLEY. That was ruled out.

Justice STEPHENS. Very well. There are some forty-seven reserved rulings and it is very difficult to keep them all in mind.

Mr. STEFFEN. I want now to state just very briefly the posture of the case as it appears from the decisions that we have read and cited in the brief filed by the Government, and also to consider very briefly the decisions in the defendants' brief.

We have stated that we believe that the pleadings charge broadly a conspiracy in restraint of trade dealing with this type of material, that is, any board or any plaster or any miscellaneous gypsum product, and without limiting ourselves, we have pointed out that in paragraph 121 we have alleged that the effect of this conspiracy, charged in paragraph 44, was to dominate, or in other words to monopolize, the entire market in board, one hundred per 2848 cent of board, and eighty per cent of the plaster market since 1929; secondly, in the second sentence of paragraph 121, that this conspiracy to restrain trade has had the effect of fixing prices on all board, all plaster, and all miscellaneous gypsum products in the Eastern area, since 1929.

And our contention was that the C. O. Brown exhibits would indicate, together with the accompanying evidence, that this conspiracy had to do not only with board under the license, where USG claims the right to control price,



but would have to do with board which was purchased by one licensee from another, and resold, where Mr. Bromley tells you he makes no claim of any privilege under the license agreements to control. That is a matter of defense.

Our charges are broad and include all products of whatever character.

Now I would like to speak concerning the ultimate facts which your Honor asked concerning just before the recess.

As we visualize the complaint, it is not to be treated as an ordinary negligence complaint, it never has been as far as we have been able to ascertain in the cases. The only authorities that the defendants have for their contentions here, are negligence cases and there, the authorities that they cite are where a person is alleging that another man was negligent and injured the plaintiff and cases where the court has said, "All you have alleged is, broadly, 2849 that the defendants were negligent, to-wit, 1, 2, 3, 4, 5, and 6; that the broad charge of negligence means nothing, and that you have to look at 1, 2, 3, 4, 5, and 6, to determine what the specific charge of negligence was".

I have read some of those cases cited in their brief. Those cases have nothing to do with the sort of transaction we have here. They have never been used, as far as we know, in any criminal case, or in any Antitrust case. These pleadings that we have here are pleadings of a charge under a statute and our pleadings are a sort of—they are not all on one plane—there is a pleading of violation of statute in paragraph 44, that is the gist of the complaint.

We don't purport to show all the details as to how that has been done, or as to when it has been done, but we show in what we have called, and what the courts have called, the means and methods, we show enough to give the defendants a complete idea of what the character and nature of the business is concerning which we have alleged there has been a restraint of trade.

Now that, I think, is carefully worked out in the decisions. We have cited the Jelke case as one case which has been regarded as a leading case, in which the very argument that the defendants are making here was urged upon the Court, that in determining the charge, which as I

recall it had to do with the oleomargarine statute, 2850 selling illegally, and then there was a series of paragraphs from 6 to 20, which are like our paragraphs 47 to 120, which said how they sold it and when, and so on, the defense was arguing that you have got to

include all of those in order to determine exactly what the charge was under the statute.

And the Court there said that Antitrust pleadings are different, or that criminal pleadings are different from any other type of pleadings; that they are not just ordinary civil actions for damages upon a negligent suit; that your first allegation is your broad allegation of the statutory charge—and the Court said it might be done in the words of the statute.

We are not insisting upon that, although I think that is true—we have no authority to the contrary. That is a restraint of trade in gypsum products, all gypsum products.

We have particularized, or described it in more detail in paragraph 121 where we say that they have fixed prices, as one of the restraints, and that is all that is essential for this particular piece of evidence, that is that it has to do with all board, it has to do with the fixed price, and that is complete.

Then, in the intermediate part we have a large number of means and methods which say that there were meetings on certain days, that they were talking about patents, and various things of that character—all of which 2851 tell the defendants in detail as to how the matter came to be, but which do not affect, as we contend, the extent of the charges.

The charges are made in paragraph 44, and they are statutory charges and in the words of the statute.

Now as we understand it, it is not essential that we allege all the means and methods. One may allege as many as he feels are necessary, and that is a matter which will come up, and you can prove, if you can prove them, they are an allegation of the facts as we understand them at the time the complaint is drawn; you don't have to prove all of them, and you are never restricted to proving only the particular means and methods that are described in the complaint.

But that is a very different thing from your charges, which are very precise. You are charging a violation of statute, restraint of trade of all gypsum products, and for purposes of fixing the prices throughout the Eastern area since 1929. Those charges are fixed, and we are bound by them, that is what we are going to prove.

Our evidence to prove them will be whatever we can bring before your Honors to establish that. We are not, as we see it, limited in our evidence for the reason that we have alleged a number of means and methods. In fact, it

is to the defendants' advantage that we have alleged a number of means and methods; it acquaints them very clearly with the nature of the case.

2852 In a criminal pleading, as your Honors know, in a criminal pleading under the Antitrust Act, you allege in the terms of the statute the offense that you charge. Then the criminal pleading, being a rather special pleading, also contains an allegation as to the means and methods in order that the defendants may be acquainted with the nature of the case, and so that they may prepare for trial.

Secondly, you allege that, so in case of double jeopardy, the defendants may say that this was a different or was the same charge that was made in the prior case.

Now that is more specific, it requires that you be more specific, than in a civil case. In a civil case, under the new rules particularly, and under our practice, we contend that it would not be essential to go into any of those details concerning means and methods. But as I say, that is academic, we have already alleged a large number of them.

I want to meet your Honor's contention—excuse me—your Honor's suggestion, that because we have gone farther and been more detailed than perhaps would be true in some complaints, that therefore we should be limited to what we have stated by way of means and methods.

We have no authority for that, and it would seem, in our feeling, that where we have gone farther toward stating means and methods, that we should not be penalized for having gone farther than if we had pleaded fewer means and methods.

2853 Justice STEPHENS. I can see your point of view with regard to it, you are arguing that you have been more than fair—and I am using that term "fair" as a word of art in pleading—in specifying as much as you have. On the other hand, there is another point of view which can occur to the legal mind concerning it, Mr. Steffen, and that is this.

Take an extreme illustration. Suppose a complaint in conspiracy under the Antitrust laws had, in terms, said to the defendant and to the court, "We charge you with a violation of the Antitrust laws in the terms of the statute, and we specify the following means and methods, overt acts and effects by which the conspiracy was carried out; and we hereby, in terms, notify you that those are all that we rely upon".

One of the purposes of a pleading is to advise the opposite party how to prepare his case, and in telling him what

he must prepare on, you in effect tell him what he need not prepare upon.

Now if you had been so explicit as to say in the complaint, "These are the means, methods, effects and overt acts which we rely upon, and no others", then you would hardly be, I suppose, in a position to contend that you could still prove others, because you would have notified the defendants, and the court, in its understanding of the issues, that that was the beginning and the end of your charge.

Now the question is, have you, by your specificity  
2854 in pleading means, methods, effects and overt acts, in effect told the defendants and the Court, "That is your conspiracy, and no other, and therefore you need not prepare on any other"—and are, therefore, the defendants in a position to claim surprise and lack of preparation? You can see that there is a possibility of two different viewpoints.

Mr. STEFFEN. I can see your Honor's argument. Let me point out first that we did not say that these are all the means and methods.

Justice STEPHENS. I understand that to be your position, I used that simply as an illustration.

Mr. STEFFEN. We rather carefully said that paragraphs 47 on were merely part of the means and methods. Then I think we can say—which was the argument made this morning—that we have given explicit notice of the particular transactions that we have here, that is, stating the ultimate fact, which is that they are charged with violating the Sherman Act, Section I, in that they conspired to restrain trade in all gypsum products; and secondly, for the effect of fixing prices upon one hundred per cent of the board sold in the Eastern area.

Now as I see it, there can be no uncertainty on that. In getting at that conspiracy, we went into a lot of detail concerning when they met, or whether Mr. Griswold and Mr. Blagden saw Mr. Avery, and whether they used the  
2855 patent license agreements, and a lot of things, all of the paraphernalia that was used for making that clean-cut conspiracy effective.

That is the thing called means and methods, and it cannot be exhaustive. The cases all say that if you were to put everything in your means and methods which will show how your conspiracy was formed, recognizing that you are not now charging conspiracy, but assuming it has been charged, how it was formed and how it operated, those are all things that are merely means and methods, they are on a different



level from the charge which is in paragraph 44. And the cases say that a pleading under the Sherman Act is a unique and different pleading.

The best illustration of that is Justice Holme's statement in the Swift case where he says:

"The general objection is urged that the bill does not set forth sufficient definite or specific facts"—not that the charge was not clear enough—"This objection is serious but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even if the constituent parts alleged are and from their nature  
2856 must be so extensive in time and space, that something of the same impossibility applies to them".

Then we cite in our brief one or two cases which indicate that if we had put in all of those means and methods to establish a charge which is clearly made, the thing would be so voluminous, probably, that it would have to be stricken. That is what the Court stated.

So that we feel that on the authorities we are pretty clear, as far as the means and methods are concerned, and I think that that is perhaps as accurate a term as any.

Now one of the most recent cases to come before us—

Justice STEPHENS (interposing): Where is that opinion of Mr. Justice Holmes?

Mr. STEFFEN. That appears, your Honor, in our brief filed on March 10, 1941, in opposition to the defendants' motion for a bill of particulars, on page 18 thereof. I might also call your Honor's attention at this time to page 42 of that brief where we clearly tell the defendants, as I see it, that we feel that the charges of the complaint are stated in paragraph 44, as to which they asked no particulars, and that the whole discussion on the bill of particulars before the District Court was on the matter of means and methods.

There the Court properly said, "Well, we will clarify your statement of means and methods, but we find no obligation on the part of the Government to make a fuller statement".

2857 In other words, the District Court said, "This is a good pleading" except for twelve minor things concerning wordings and slight ambiguities as to what we meant by "miscellaneous products", what we meant by

"manufacturing companies", and things of that sort, which are very incidental—the Court said, "This is a good pleading", and we cannot be prejudiced because we have a good pleading.

Now when the Court says, "This pleading is not subject to a bill of particulars in respects concerning which the defendants inquire", they don't say, "And that is all the pleading you can make"—they don't pass upon that question. It is implicit in those decisions that if you have made a good pleading you, within those pleadings, may put on what evidence you find will go to make out your case. Your pleadings, of course, are simply to give general notice and to state your charge, and the defendants have their opportunity, as they properly took it, to ask for a bill of particulars, and in that they got, out of 165 requests, twelve rather minor ones, which we take as a compliment to the Government, that our pleadings were good. That is *res adjudicata* so far as the pleadings are concerned in this case.

And the question is if we were now to say, having argued the question of the sufficiency of our pleadings, that we are bound now to put in nothing more than what was in the pleadings at that time, it would be going in the back  
2858 door to do what Judge O'Donoghue said you could not do directly. That is, our pleadings are good—and to now say that we cannot put in any evidence because they didn't get a bill of particulars concerning it, is, I think, to subvert the whole process.

Now I want to refer your Honors, because I think the case is an important one, to the General Motors case. The language we have used in our brief is very much in point. They had there practically the same question that we have here coming up in a criminal case, and in a criminal case I think there will be many considerations why a court might be less inclined to allow evidence than in a civil case where our main purpose is to get at the essential truth of the matter, and the idea of protecting a civil defendant is not quite as strong as it would be in a criminal case.

In other words, this is a longer case, we haven't a jury, and the matter can be handled much more informally.

There they say:

"The appellants objected to the evidence in classes (3) and (4) on the ground that it had not been charged in the indictment. As a matter of fact, the evidence relating to losses upon liquidation was fully covered in paragraph 70 of the indictment, and the evidence pertaining to the forcing of unordered cars was admissible under paragraph 52

of the indictment. It is true that the forcing of tools, equipment and accessories was not specifically alleged in the indictment, but it is reasonable to conclude that this form of discrimination was sufficiently alleged in the catch-all clause found in paragraph 34 of the indictment."

It isn't as precise, that "catch-all" clause, I think, as is our paragraph 121 which I have spoken to you of, where we charge that they had dominated 100 per cent of the board business in the country, and had fixed prices throughout the period. Then the Court goes on to say:

"In any event this evidence would have been admissible on the theory that the Government is not necessarily limited in its proof of conspiracy cases to the particular means alleged in the indictment"—and they cite *United States v. Socony-Vacuum Oil Company* and *Patterson v. United States*—and that, as we understand it, is the prevailing and the only ruling on this matter of means and methods."

You allege your means and methods in such detail as the court feels is essential under a bill of particulars. You are not limited to your proof by those particular means and methods, and you don't have to prove all of those means and methods.

Now may I just say one or two words more? I want to refer to the defendants' brief, page 2, and it may clear up some of the discussion.

The opening sentence says, "The Government apparently concedes that there is no specific allegation in the 2860 complaint to which the documents in question are material". Of course we don't concede at all that there are no charges in the complaint, as we have argued this morning. This evidence is very material to establish the broad charge of a conspiracy in restraint of trade concerning all gypsum board for the purpose as alleged in paragraph 121, of fixing prices, and that they have fixed prices.

Then they conclude:

"The Government's argument, if upheld, would permit the introduction of any matter occurring in the gypsum industry prior to August 15, 1940, would make the pleadings purposeless and would require the defendants to stand trial without any conception of what the full charges against them are"

Well, I think I have met that. The full charges are stated in paragraph 44, and they are very broad, and the defendants understood that they were. So that the only

thing that the defendants are not advised of is what particular evidence we are going to put in to establish those charges, and it is not the function of a pleading to say that the North Holston plant was closed and some board was purchased from USG and sold by Certain-teed. We have said that they monopolized all board, and they fixed prices on all board. That happens to be some of it, and we would like to establish that, or show that in order to establish our charge, which is very precise, in paragraph 44, as explained in paragraph 121.

2861 I think that same error runs straight through the defendants' brief. They continually consider that there is no charge here, and that you only can find the charge by looking at the means and methods, which of course never purported to state the charge. They purported simply to broaden out the pleading.

I think I have already referred to the only authorities which the defendants have which would, if followed, be effective to reach their result. That is, if we were to use the negligence cases in this situation, that then they might have an argument to stand upon. They never have been used, and the distinction between a statutory charge and a common law negligence action, where you have to set up all of the ingredients of the negligence in order to make your charge, I think is perfectly obvious, that when you allege negligence you do not allege anything in and of itself, you have got to go ahead and state what was done and wherein the negligence lies.

When we allege a violation of Section I of the statute in that the defendants conspired to restrain trade in all gypsum products throughout a particular area, and couple that with a statement in paragraph 121 that it was for the purposes and with the effect of fixing prices on gypsum board throughout that area and for that period of time, we have made a very clear charge. That is a charge. Then there is nothing in the means and methods which  
2862 makes charges or which takes away from the charges.

So I think that the negligence cases really haven't any bearing upon this.

Then the defendants in their brief recite the *United States v. Sugar Institute, Inc.* case, and one or two others, but their reference to those cases, as I see it, is beside the point. That is, they point out that we cited the case of the *United States v. Sugar Institute, Inc.* in our argument on the bill of particulars, and we did quite properly and we



now cite it here again for the same purpose, showing that our pleadings were adequate—and the question now is whether we can put in the evidence to support the pleadings.

May I have some additional time at the conclusion of Mr. Bromley's argument?

Justice STEPHENS. Yes.

Do you want to comment, before you close your opening argument, on the situation with respect to National, Celotex and Texas on the perforated lath, or do you think you have sufficiently covered that by your general proposition that they also, although they didn't have a license to manufacture perforated lath, are notified by the pleadings that they are nevertheless charged that they were participating in the conspiracy with respect to perforated lath?

Mr. STEFFEN. I am glad that your Honor called that to my attention. We feel that perforated lath is clearly  
2863 within the terms of the general charge, paragraph 44, that is it calls for "all gypsum products". There can be no question here, I think, after Mr. Bromley's statement the other day, that perforated lath is no different from ordinary lath, particularly, when you put some holes through it; it is all gypsum lath, one way or the other. They can put on a different kind of paper and it would still be gypsum lath.

Our allegation is that these defendants, all of them, have conspired to fix the prices upon all gypsum products. Now we don't say that it makes any difference whether they were under the license or not under the license, that isn't a matter in the charge. That may be a matter of evidence. But in the charge we say that they have fixed the prices on all gypsum products, and that would include, I think necessarily, the gypsum lath made by National, perhaps not under the license, perhaps not patented, we don't care, and sold at a fixed price.

Mr. Higgins' evidence would indicate that they sold perforated lath even though they didn't have a license, at identically the same price that they sold the non-perforated lath, which would seem to me to bring it easily and clearly within the general charge.

Thank you.

2864 Justice STEPHENS. Many of the questions which

I might have asked the defendants have been asked, in effect, by the argument of the Government which you will reply to, Mr. Bromley. But there is one question I would like to ask you.

Let us assume that the complaint, as drawn, does not, in terms or in fair intendment, charge the defendants with violation of the anti-trust laws in respect of board bought by one from another, as distinguished from board manufactured under the licenses and then sold—is not the evidence of fixing prices on board bought and sold between the defendants, as distinguished from manufactured and sold, introducible in evidence, not to prove that as a violation of the anti-trust laws, but to prove that there was price fixing under the license agreements? That is to say, if the price fixing under the license agreements, which is charged, is to be effective, board not manufactured and sold under the license agreements must also be sold at the same price. Otherwise, the price fixing under the license agreements would be ineffective.

The answer that suggests itself to my mind in debating pro and con on that question, is one which may interest Mr. Steffen to comment on when he replies, and that is that there isn't any denial in the case that there was price fixing under the license agreements. That is admitted, except so far as resale price fixing by manufacturing distributors is concerned. Therefore, the evidence is unnecessary.

You may proceed.

*Argument on Behalf of Defendants United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode*

By Mr. BRUCE BROMLEY

Mr. BROMLEY. May it please the Court, not only would such evidence be unnecessary, but what possibly could be its probative value? If you suggest that it has probative value, doesn't it follow that proof would likewise be introducible and receivable that this conspiracy encompassed the dealers, and that their prices to contractors were likewise fixed by agreement among everybody?

It seems to me that once you extend the scope of the charge even to this limited degree, there is no end to the process. If my friend's position has any soundness at all, under paragraph 44, if he really means what he says, that the conspiracy was to control the prices of 100 percent of the board, he states that without limitation. That must encompass "bought and sold" board as between the licensor and the licensees; as between the licensees; it must extend to the manufacturing distributors; it could extend to the dealers; it could extend to the contractors. What possible probative force would proof that the dealers' prices to the

contractors were controlled by the defendants have upon the charge in the complaint that these defendants used the licenses as a subterfuge? It seems to me that, there-  
 2866 fore, your question is susceptible to both answers,— that it is unnecessary, since we admit price fixing; and that it has no probative value for the reason that it is as foreign to the charge as would a charge that these defendants had had an illegal conspiracy to fix prices be.

Justice STEPHENS. On the pure question of probative value, Mr. Bromley, I don't quite yet see your point. Let's assume, for the purpose of illustration and discussion, a charge of price fixing on board manufactured under licenses. And let us assume a case in which that was denied, so we will eliminate the question of the necessity of having the evidence coming in. Assume that was denied. Wouldn't it be some evidence, if the defendants had fixed prices on manufactured board, that they had also fixed them on board not manufactured, of the same character and sold by them, because in order to make the prices stick on the manufactured board they would have to fix the prices on all similar board of similar quality? So that, to show the whole scheme, so to speak, both parts must be shown?

Mr. BROMLEY. Well, it seems to me that in the face of the charge, it has no probative value, because the complaint specifically alleges that in order to make this license conspiracy effective, this conspiracy went one step farther and controlled certain resale prices.

Justice STEPHENS. Well, that gets over into another  
 2867 other question which it seems to me, with all respect to counsel on both sides, we ought to keep entirely clear of, for the purpose of clarity in our reasoning.

One place in the Government's argument that has left me confused is that when questions are asked about what is charged, the answer is, "Whether it is charged or not, it is admissible in evidence, because it is probative of what was charged."

But then when some question is raised as to whether it is admissible in evidence, the answer is, "Well, it was within the charge." And it seems to me that your answer here at this moment runs over into that same danger of shifting.

You come back and say that it isn't probative because it isn't charged, and I was trying to eliminate from the discussion, for the purpose of clarity in my own reasoning at the moment, the question of what is in the charge.

I am assuming that there is nothing in the charge which covers board bought by one defendant from another, and

sold; and I am assuming a charge of price fixing under licenses; and I am assuming that there was a denial of that price fixing. I am asking you, wouldn't there be some evidence that there was price fixing under licenses if it was shown that in the same quality of board, not made under the licenses, there was also price fixing by the same persons, because it would show a complete scheme, and to prove one part would also help to prove the other. And your last response to that was, "Yes, but it is within the charge."

I don't say that in criticism, but because I am trying to keep my own reasoning thoroughly clear, because this question of pleading isn't a mere technicality, as I once said in a dissenting opinion, which I understand has had some adoption by majority opinions. The adjective side of the law is far from a mere technicality. It is the channel through which we carry the substantive law into effect, and a pleading for the purpose of notifying courts and parties what they are charged with is very essential to substantive rights.

**Mr. BROMLEY.** To answer your question on the proper ground, as you have suggested, it seems to me the way to test the soundness of a negative answer is to say, "Why, that proof is utterly immaterial, and it can be demonstrated to be immaterial if one will assume that that was all of the evidence in the case."

Now suppose that were all the evidence in the case? Would it in any way establish that these defendants entered into license agreements and fixed prices as a subterfuge; would it at all establish that they did fix prices under patent license agreements? It wouldn't have any probative force whatsoever, it would be entirely immaterial. It wouldn't tend to prove the charge in any degree whatsoever. It is a separate inquiry.

I think that is the best answer I can give to the question. Now, if Your Honors please, I have great difficulty in following my friend when he talks about paragraph 44. It seems to me that paragraph 44 might just as well have been entitled, "Statutes Violated", because if you look at each one of the sentences in paragraph 44, you will see that there is a reference to a numbered section of the Sherman Act. All paragraph 44, in effect, says is that defendants have violated Sections 1, 2, and 3 of the Sherman Act. Why, there isn't even a mention in paragraph 44 of price fixing.

If you stopped with paragraph 44, no one could tell whether the charge of the violation of the Sherman Act



was pure monopoly; whether it was engrossing all the product; whether it was running competitors out of business; whether it had any relation to price fixing or whether it didn't. It doesn't charge a conspiracy. It wasn't intended to. All it says, in effect, is that we violated 3 sections of the law, and it makes no mention as to how we violated them. It is just as though a plaintiff in a negligence suit started off and said defendant was guilty of negligence—period; or if plaintiff in a negligence suit said defendant violated the speed law, Section 44 of the Motor Vehicle Law, and stopped there. It doesn't state a cause of action whatsoever.

Now while that precise question is beside the point, it seems to me clear that no one could argue that it did state a cause of action. But suppose, for the purpose of the argument, that it be said that it does state a cause of action? If that complaint were served upon any set of defendants, their counsel would immediately, assuming they had been defeated in their demurrer, move for a bill of particulars. And if they moved for a bill of particulars, any court in the land would require the Government to state what the charge was—"What is the conspiracy?" "Has it to do with prices?" "If it has to do with prices, prices of what products?" "Whose prices?" "When?"

Now suppose that motion had been made under this paragraph 44, standing alone as a complaint—the Government would have returned, in answer to the court's order that it furnish particulars, just what it did furnish here in the complaint, plus what it furnished in its bill of particulars. And the defendants would have been protected, they would have ended up with a clear and concise statement of just what the charge was, that it was price fixing, that it had to do with board, plaster, and tile, and block, and cement, and nothing else; and just what the extent of the agreement was.

Now if that had been the result, as I understand my friend, he wouldn't argue today that the Government could go outside of the charges in the bill of particulars. For, as I understand him, he admits that he could not possibly urge that this court should receive any evidence as to price fixing on brick.

Of course, he is forced to admit that this conspiracy as it stands, in the face of the pleadings and the bill of particulars, today, is limited to board, plaster, block, tile, Keene's cement, and no evidence having to do with anything else would be receivable.

By the same token, it seems to me, he must admit that as the pleadings and the bill of particulars stand today, the charge is of a specific combination or conspiracy, the limits of which, not the means by which it was carried out the limits of the combination, are specifically described in the pleadings as they stand.

Now if that weren't so, then I think the statement in our brief is absolutely so, that the pleadings would then be purposeless, and he could introduce evidence of anything he wanted to that occurred in the gypsum industry, that he thought constituted a violation of law.

All paragraphs 44 and 45 do, as I read them, in this complaint, is to say that the defendants have violated the 2872 Sherman Act in that they have formed a combination for five purposes, which combination is as follows:— and then for 20 pages there is a description of what the combination is.

And just to make that beyond the possibility of any dispute, I call your attention to the fact that the concluding paragraph, concluding sentence, rather, of paragraph 44, says that the "contracts, combination, conspiracy, monopoly, and attempt to monopolize will be referred to hereinafter as the combination."

And then from paragraph 45 to paragraph 54, its objectives are elaborated; and at the end of 46 it is alleged that the formation and operation of the combination is more fully set forth in the remainder of the complaint, from 47 to 120.

When we get down to paragraph 54, we find that they shift their ground and talk about a comprehensive plan for the stabilization of prices in the gypsum industry under the leadership of USG. Then in the concluding clause of that sentence, "and eventual adoption of the plan by every important board manufacturer in the Eastern area."

Well, there my friend might have a broad allegation, because that allegation describes a comprehensive plan for the stabilization of prices in the gypsum industry, without any limitation as to what that plan was.

We saw that, and the court before whom we argued the motion for a bill of particulars saw that, and we 2873 were careful to ask a question about it, because we felt that was the only charge which could possibly be construed as a broad charge and might not be limited by what followed in the complaint. So we asked the Government to tell us whether or not that was so. And the court ordered them to tell us, and they answered it as follows:

"The allegations of paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint."

Now it seems to me it is just as though they had ended up a bill of particulars and said, "The above is a complete description of the conspiracy, and the Government does not contend that it is any broader than the description which precedes this statement."

So that it seems to me that the Government can not now argue that it is not strictly bound by the allegations of the complaint as amplified by the bill of particulars. And I see in no case anywhere any suggestion that the rule which is certainly applied in negligence cases, as my friend points out, is to be relaxed in anti-trust cases.

The citation of authorities which we have given for that proposition, appearing on page 7 of our brief, is a citation of cases not, however, limited to negligence cases. I recall for instance, that the very first case, the 2874 *Eddings* case, is a Fair Labor Standards Act case; and that the third case, against the Union Pacific Railroad, is a cause of action under a statute for a penalty for failure to water cattle.

Now the Government has not cited, even in that part of Justice Holmes' opinion which it read, that that rule that the parties should be bound by their pleadings or their particularization of the pleadings, should not apply or should be relaxed in anti-trust cases. The only case which they have cited, and which we can find, I may say, which even bears on the question, is the *General Motors* case, to which my friend has referred.

That case, it seems to me, supports our position entirely—

Justice STEPHENS (interposing). What volume is that in?

Mr. BROMLEY. 121 Fed. 2d.

Justice STEPHENS. Thank you.

Mr. BROMLEY. I say that case supports our position entirely, because the Court considered with great care this precise contention, that the Government in that case was bound by the indictment, and considered whether a certain class of evidence, to which no specific reference had been made in the indictment, was admissible; and concluded that the indictment covered it.

2875 Now if there had been any general rule in anti-trust cases that this doctrine that the Government should be bound by its allegations didn't apply, there would

have been no necessity for the careful consideration which the court gave the matter.

In that case the allegation was that the General Motors Company, its subsidiaries and officers, had conspired to refuse to do business with automobile dealers, except on condition that the dealers agree to take their financing from the General Motors Acceptance Corporation. That was the conspiracy charged.

Justice STEPHENS. Repeat that, please. Charged with what?

Mr. BROMLEY. That the General Motors Corporation, its subsidiaries and officers, had agreed among themselves not to do business with automobile dealers except upon the condition that the dealers agree to take their required financing from the General Motors Acceptance Corporation.

Now that was the scope of the agreement, that was the conspiracy alleged, and it is referred to by Judge Kerner in exactly those words in the opinion, at about the middle of the opinion.

The indictment alleged a very complete summarization of the specific conduct embraced within the illegal concert of action, and it alleged among other things that 2876 General Motors forced dealers to take an excessive number of new cars so that their requirement for financing would be great.

At the trial the Government proved that General Motors not only required them to take a large number of cars, but also required them to take tools and accessories as well, and the point raised upon the appeal by the defendants, after conviction, was that that evidence about forcing not only cars, but tools, on the dealers, was without the charge in the indictment, was not covered by the indictment. And that is the point to which the court addressed itself.

It seems to me a very narrow point, and one which would require a far stricter interpretation of a pleading than is here required.

Now the court reached the conclusion that that evidence was admissible because of the allegations of the indictment in paragraph 34; and because, after all, the allegation was only one of a means, and not a substantive part of the agreement.

The court said on page 408, under paragraph 30, in the middle of the paragraph:

"It is true that the forcing of tools, equipment and accessories was not specifically alleged in the indictment, but it is reasonable to conclude that this form of discrimination



was sufficiently alleged in the catch-all clause found in paragraph 34 of the indictment."

2877 Now the Government's brief would have you think that paragraph 34 of that indictment was like paragraph 44 of this bill of complaint. So I went to the indictment and copied it out, and here is what paragraph 34 was:

"And the Grand Jurors upon their oaths do further present that continuously for many years heretofore, to and including the day of the finding and presentation of this indictment within the Northern District of Indiana, said defendants and others to the Grand Jurors unknown have engaged in a conspiracy in restraint of trade and commerce among the several States in Cadillac, LaSalle, Buick, Oldsmobile, Pontiac, and Chevrolet automobiles, and the defendants have conspired to do all acts and things and to use all means necessary and appropriate to make said restraint effective, including the means, acts and things hereinafter more particularly alleged, and other means, acts, and things to the Grand Jurors unknown."

Now with that kind of an allegation, the Court said this proof that the articles forced upon the dealers included tools, as well as automobiles, although the precise allegation was only automobiles, entitles that evidence to be received.

Then it went on to point out: "In any event, this evidence would have been admissible on the theory that the

Government is not necessarily limited in its proof,  
2878 in conspiracy cases, to the particular means alleged in the indictment."

Now what is the distinction between a means and what I have been referring to as the point of this argument, the charge of the extent of the combination, conspiracy, or agreement? It seems to me that it can be illustrated this way: In this case, there is an allegation that so far as the conspiracy was concerned, the defendants agreed among themselves to charge the same prices for plaster manufactured by each defendant. That is the charge of the agreement, so far as plaster is concerned; and that conspiracy also includes tile, block, and Keene's cement. That is, that so far as that part of the conspiracy is concerned, their pleading charges that the defendants agreed to charge uniform prices, without the benefit of any patent, on plaster; Keene's cement, block, and tile.

Then the complaint goes on to allege that one of the means which they used to accomplish this was to file protected job contracts with the Gypsum Statistical Institute so far as plaster was concerned. That is the means which

they used to effectuate their common agreement to unify the prices of these named products.

Now suppose the Government should come in and prove that they used this Institute to file the prices of protected contracts on tile, as well as on plaster. That is not 2879 alleged in the indictment. I take it that under the

General Motors case, because that is merely a means and is not part of the charged contract or conspiracy, that the Government is not limited and could prove that the Statistical Institute was used as a means to control tile prices as well as plaster prices.

But it does not go to the extent of saying that where the charge is that the only things the conspirators agreed upon were to control the prices of board, plaster, block, tile, and cement, that the Government can now come in and disregard that charging part of the complaint and try to show that they also agreed upon the price of brick.

Nor does it, I submit, entitle the Government now to come in and say, "The conspiracy was broader than what we alleged it to be, and includes not only price fixing of patented board under the license, manufactured and sold by the licensees, but includes board manufactured by one and sold to another." Because, I submit, if they can introduce that proof and so extend the conspiracy, they can say that in the field of that part of the conspiracy which deals with manufacturing distributors' resale prices, as a matter of fact, the agreement extended so as to include the 20,000 dealers in this country; and they could come in here and offer to prove that it was a part of the conspiracy that the resale prices of the 20,000 dealers were controlled by 2880 these defendants.

Now there must be an end to the extent to which they can now prove this conspiracy reached, and if you don't stop at the limits set by this charge, where are you going to stop? And that is why it seems to me that this question before us now presents the problem which governs all of these offers, to the extent that it is clear that they go beyond what the complaint charges, as amplified by the bill of particulars.

And what we meant in our brief when we said, at the outset, "The Government apparently concedes that there is no specific allegation in the complaint to which the documents in question are material," is just that. In the list of specifications of the extent to which the unlawful conspiracy went, is there any reference whatsoever to the fact that the agreement among the defendants included the fix-

ing of prices on board manufactured by one manufacturer and sold to another, so far as the resales of that board are concerned?

Now that brings me to paragraph 121. My friend emphasizes that paragraph 121 says the effect of this conspiracy is that the prices of 100% of the board made were fixed. He overlooks the fact that that is merely a charge of the effect of the conspiracy which complaint charges. I mean by that, the complaint charges that the first sale of 100% of the board made in the industry, that the 2881 price of the first sale of 100% of the board made in the industry, was fixed.

Well, it was. This board which Certain-teed bought down here at North Holston from USG was sold to Certain-teed; it was made by somebody else. So far as the sale by the manufacturer of that board to Certain-teed was concerned, that price was fixed under the license.

Now the Government comes along and says, "Oh, we want to show that this conspiracy extended to the second sale of that board, to the sale by Certain-teed, the purchaser of that board."

Well, there is no charge in the complaint that suggests that, and there is no inadvertence about it, because there are lots of allegations in the complaint about resales, about second sales, of board manufactured by these defendants under the licenses and under the patents, and there is a bill of particulars about that.

They allege that so far as these plaster manufacturers who don't make board are concerned, they bought board. That sale—

Justice STEPHENS (interposing). Judge Garrett wants to see a copy of the bill of particulars. Will you get it for me, Mr. Cantor?

Mr. KNUFF. I have some extra copies of the Government's bill of particulars here, if you care for one. I don't have an extra copy of the motion for the bill of particulars.

2882 Justice GARRETT. The bill of particulars is what I want.

(Copy of bill of particulars handed to Justice Garrett.)

Justice GARRETT. Thank you.

Justice STEPHENS. If you have an extra one, let Judge Jackson have it, will you?

Mr. KNUFF. Yes, I will.

(Copy of bill of particulars handed to Justice Jackson.)

Justice STEPHENS. Proceed.

Mr. BROMLEY. So that the unlawful contract or conspiracy, as delimited by the complaint, has to do with resale prices as well as the prices of the first sale of the patented goods manufactured. But it is limited—

Justice STEPHENS (interposing). It specifies resale prices with respect to manufacturing distributors?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. Does it with respect to any others? What are the others?

Mr. BROMLEY. No, sir, so far as the resale prices of people who sell patented board are concerned, it is limited to about 8 or 9 named manufacturing distributors in the bill of particulars under paragraph 42 of the complaint.

There is only one other reference in the complaint 2883 to the resales of anything, and that is metallized board. And that is an allegation that although some of these defendants took licenses from us, they never intended to manufacture the product and they bought it from us; and they resold it, made a second sale of it, under a part of the conspiracy that they would nevertheless observe our fixed prices as their resale prices. So that this conspiracy encompassed not only—as alleged—not only 100 per cent of all the board manufactured and sold the first time, but it was meticulous in alleging that it also encompassed the second sale of that board, but confined strictly and definitely to the second sale of that board, first by 9 named manufacturing distributors; and, second, by two or three licensees who bought metallized board instead of manufacturing it under the licenses. And there is no suggestion that the Government ever thought or ever had in mind or ever intended to charge us with the third class of resale price maintenance, to-wit, such board as, once having been manufactured by one manufacturer, was sold to another and then resold by the other. There is no suggestion that the Government intended to charge us with agreeing, in our conspiracy, to control the second price of such board.

There is no more suggestion of that in the complaint than there is a suggestion that they intended to charge that the resales of all of our customers, the dealers, were 2884 controlled by us in combination with them.

Does my friend for a moment mean to suggest here that he could now produce on this witness stand numbers of these 20,000 dealers to testify that they were forced or coerced or voluntarily agreed with us to maintain our prices in their resales? I don't think Your Honors would



hesitate a moment about that, because that would open up a whole new field.

Would it have any probative value as to whether or not we used these licenses as a subterfuge? It seems to me clearly not. It is an entirely separate and distinct extension of the agreement charged.

This agreement, this unlawful conspiracy, might have reached down to the contractors, it might have reached into brick, it might have reached into all sorts of things, into paints and varnishes, just as easily as it might have reached where it is alleged to reach. But the controlling fact is that the Government limited it to the Eastern area of the United States, and limited it to four products, and limited it to the first sale, except for a very minor part of the resales, to-wit, the manufacturing distributors and the metalized board, and saw fit to stop there; and said that the plan which they were talking about is nothing other than charged in the complaint.

So that it is just as shocking, from the standpoint 2885 of fairness—and I speak, of course, legally—to think that they can come in now and disregard, in this respect, as to bought and sold board, as it is to think that they could come in and disregard the limitation that this conspiracy agreement had to do only with the four named products.

And I think it is a question whether, within the charge as to the nature of the conspiracy, this proof can be said to be material. I don't think it can be said that this proof is only proof of means, because it is no more logical to say that proof that price fixing extended to bought and sold board is a means, than it would be to say that this conspiracy extended to brick is a means, to carry out the alleged combination, which is alleged to be one to fix the prices of certain articles in certain fields.

And now, I wanted to say a word about perforated lath.

Justice STEPHENS. Before we change the subject, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

2886 Mr. BROMLEY. May it please your Honors, I come next to the question of perforated lath as that evidence was presented by the witness Higgins.

Let me at the outset, with respect to this matter, pose Your Honor's question to me at the very opening of my argument. Your Honor might well, with respect to this

subject matter, ask the same question in this manner:—Is not evidence of fixing of prices by National as to its perforated board introducible not to prove that as a violation but to prove that there was price fixing under the USG license?

Now the charge with respect to perforated lath is just as strictly delimited in my view as is the charge as to price fixing of board and lath generally, and I invite your Honors' to look at page 30 of the complaint, paragraphs 115 to 120.

As I understand those allegations, the charge of the unlawful agreement in this aspect is that USG had a patent on perforated lath, that it agreed as an inducement for taking out a license, to maintain the price at a differential above the price of ordinary lath—a contention which is immaterial to this argument; and secondly, in paragraph 119, that although it, and Certain-teed and American, who took licenses, were advised that the patent was invalid, they nevertheless entered into the licensee agreements as a subterfuge for the purpose of price fixing.

Now the last sentence of paragraph 118 says:

2887 "Throughout the period from the date of execution of the first of said agreements to the month of May, 1938, U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G.",—"all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G."

Now that might include National, because while National was not a licensee under the perforated lath patent, it was a licensee. So in our motion for a bill of particulars we asked this question—or rather the Court ordered, in response to our demand, that the Government furnish particulars in answer to this question, Par. 10 on page 3 of the order:

"State whether it is intended by the use of the expression 'all of the licensees of U.S.G.' in the last sentence of paragraph 118 of the complaint, to refer to the licensees named in paragraph 89 of the complaint (that is, all of them) or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118".

So we asked them specifically what they meant when they said the "licensees of U.S.G."—did they mean

2888 all the licensees or did they just mean the perforated lath licensees.

And they answered that question as follows, in Paragraph 10 of their bill of particulars:

"In compliance with the tenth paragraph of said order, the phrase 'all of the licensees of U.S.G.' appearing in the last sentence of paragraph 118 of the complaint, refers to the licensees of U.S.G. under the perforated lath patent as set forth in paragraph 117 of said complaint."

Now that excludes National and Texas and Celotex, the three that Your Honor mentioned.

Now the Government comes in and says, "oh, but we want to prove (in the face of this allegation, and in the face of this bill of particulars) that as a matter of fact National, Celotex and Texas observed the prices fixed by USG."

Not only is the charge now so delimited that they should not be permitted to do that, but has it any probative value whatsoever, if the Court please, on the charge that USG and its perforated licensees, having been advised that our patent was invalid, nevertheless used the license device as a subterfuge? It seems to me that the answer is clearly no, and that it, in turn, reflects the soundness of the same answer which I gave with respect to your Honor's question, as applied to the field of bought board, which we started out to talk about.

In other words, the fact that National and its  
2889 licensees saw fit to sell the National perforated lath at the same price that USG did, is no proof that USG and its perforated lath licensees were using the license under the USG patent as a subterfuge, not to gain the reward of the patent owner, but to unlawfully fix prices.

And your Honors will remember that that testimony of Higgins extended from page 2037 to page 3041 of the transcript, I think, and had to do with the prices that National charged for its particular kind of perforated lath.

Thank you.

Justice STEPHENS. We should like to have you particularly, in your reply, Mr. Steffen—we do not mean to limit your reply—but we should like to have you direct your attention to the argument concerning paragraph 54 of the complaint, as limited by the bill of particulars, and the effect thereof on paragraph 121 of the complaint.

Mr. STEFFEN. Its effect on paragraph 121, you say?

Justice STEPHENS. Yes.

Mr. STEFFEN. I think I can finish rather briefly, your Honors, although there are several questions, particularly on perforated lath, that I desire to cover.

Justice STEPHENS. You may take such time as you need, Mr. Steffen.

Mr. STEFFEN. I would like to take up the perforated lath question first because that happens to be fresher in my mind.

2890 Justice STEPHENS. You may do so.

*Reply argument on behalf of the United States*

By ROSCOE T. STEFFEN

Mr. STEFFEN. The argument is made that the bill of particulars on perforated lath, as addressed to paragraph 118, has limited the proof in this case.

If you will read it literally it says:

"Throughout the period from the date of execution of the first of said agreements to the month of May, 1938—

Justice STEPHENS. Where are you reading from?

Mr. STEFFEN. From paragraph 118, the last sentence. ". . . U.S.G. determined and fixed the prices of perforated lath at a differential above the prices of straight lath, and all of the licensees of U.S.G. sold perforated lath at said prices so determined and fixed by U.S.G."

Now it seems to me that all that says in effect, if I have apprehended the argument correctly, is that USG, under its license agreement on perforated lath did fix the prices of perforated lath, and they did so at a differential above the prices of straight lath. I think that that is a perfectly intelligent and consistent statement to make.

That is all we expect to prove that USG had done, that is, that under their agreement they had fixed the prices at a differential of 25 cents.

Now Mr. Bromley, I gather, treats this little group  
2891 of paragraphs on perforated lath as being a separate charge and a separate part of the indictment, as though we had then said that the defendants violated the Sherman Act in the respect that they had restrained trade on perforated lath, to wit, that they had done these things.

These paragraphs on the perforated lath agreements are a part of the whole indictment, and perforated lath is like ordinary lath, or like wallboard, or plaster and the other products. And our charge is a very broad charge,



that they fixed the price on all products, inclusive of perforated lath.

Then, when we come to perforated lath, we specify that there were separate license agreements, and under those agreements they fixed the price at a 25 cent differential above what they were selling ordinary lath at.

So it doesn't seem to me to change the basic argument we made this morning, and that perforated lath, just like any other product which is comprised within our broad charge, is to be brought within the complaint.

Now I notice that Mr. Bromley made no attack on the essential position that we took this morning, and that is that paragraph 44 states that it relates to combinations and a conspiracy in restraint of trade concerning all gypsum products, and that in paragraphs 121, 122 and 123 we denominate those as price fixing and monopolization charges, and that they cover 100 per cent.

Mr. Bromley met that in no respect excepting to suggest that if our contention were correct, that they we would be able to prove price fixing in bricks under this conspiracy, or that we would be entitled to prove price fixing on the part of some 20,000 dealers. When he said that he was simply setting up a straw man.

Paragraph 44 isn't merely a recital that these are the statutes we are interested in. Paragraph 44 says that these defendants—and they are fully named in the preceding ten or fifteen paragraphs—conspired to restrain trade—which are the words of the statute—in gypsum products, which are carefully described in the preceding paragraphs, 43 of them more or less, and then goes on to say, as I think we argued very fully this morning, that it was done with certain purposes, which are stated in Paragraph 45, and then Paragraphs 45 (a), (b), (c), (d) and (e) are stated to be the means by which those purposes were effected.

That is to say, that you have conspired to restrain commerce in gypsum products for the purpose and with the effect of dominating the manufacture and distribution of those products by, (Par. 45-a), fixing prices on board made and sold by the defendant companies; (Par. 45-b), by concertedly standardizing gypsum board; (Par. 45-c), by concertedly raising the price of plaster; (Par. 45-d), 2893 by concertedly refraining from distributing gypsum board, plaster and miscellaneous gypsum products manufactured by said companies through jobbers; and (Par. 45-e), by concertedly inducing and coercing manufacturing distributors to resell at the raised and fixed prices.

Those are all means by which they have dominated the manufacture and distribution.

Now it seems to me that the argument is clean to this point and has not been shaken at all by Mr. Bromley's discussion. We are not talking about prices to 20,000 dealers, there is no question about that. We are not talking about bricks; we are talking about this particular industry. We have described the particular charge, we have described the fact that it has to do with fixing prices, and we know that it is fixing prices to dealers. It is that price which is involved.

It occurs to me—I think from Judge Jackson's question the other day that he may have had some question, because I recall him raising the point as to why we didn't allege in paragraph 45 (e) that we were charging the defendants also with controlling the resale price where board was manufactured by one and sold by another, which is the case we have here.

Now as Mr. Bromley brought out, he says that there is no charge in the complaint that one manufacturer did make and sell to another who sold to the dealers, he says 2894 that the complaint merely alleges a fixing of the first price. I would like to dissent very definitely from that. There is nothing in the complaint at all which says that it is concerned with the first price. It is concerned only with the dealer price, that is the price from these defendants to these dealers. That is the price that is fixed throughout the industry.

Now it occurred to me that I might make it a little clearer if I could draw a short diagram on the blackboard. May I have that permission?

Justice STEPHENS. Yes. Mr. Marshal, will you get the board over where we can all see it.

(Whereupon, Mr. Steffen drew two sets of diagrams on the blackboard, and referred to these diagrams in the following discussion.)

Mr. STEFFEN. I don't want to go into too much detail, but this first diagram here, showing USG, and A, B, C and D, is what we visualize as the group of defendants. If there is a conspiracy to be proven, they are the conspirators and that is the conspiracy. That is a cross section of the conspiracy.

Now when this group, any one of them, sells to a Manufacturing Distributor, that is one sale from any one of this group of so-called conspirators.

The second sale, which is the one that is fixed in this case, is the sale to the Dealer. The USG bulletins 2895 fix the price, the dealer price, throughout the United States, and that is admitted.

Now we charge in Paragraph 45(e) that these people here, USG and the other licensees, have sold to the Manufacturing Distributor and have controlled the price at which he sells to the dealer, and we made a specific notation of that in 45(e), that is, we say that they have dominated the industry by controlling the price at which the Manufacturing Distributor sells to the dealer.

That is what we would regard as resale price control, and we charged that, and the cases have always held that that would be an illegal matter, if proven, that it is a violation of the Sherman Act, and it would be one of the restraints which is charged in Paragraph 44, that the defendants have conspired to restrain trade; and we say in 45(e) that they have controlled this Manufacturing Distributor's price to the Dealer.

Now let's take the other situation, which is the case we have with C. O. Brown. USG has sold certain board to A. A, in turn, has sold that board out to the Dealer. This is an intra-conspiracy transaction. If A were the Newark Plaster Company, A would have bought, perhaps, some of its gypsum from USG, I mean its gypsum rock, or it would have bought paper, or it would have bought from the American Cyanamid perhaps some synthetic gypsum—all of which goes into the board.

2896 We are not interested in this transaction between USG and A, or between A and the American Cyanamid—I don't think that is illegal and we didn't charge that it was illegal and we don't now contend that that transaction was illegal. We do contend, however, that this whole group, however they got their board, whether they made it themselves or bought it from one another, have controlled the price to the Dealer.

And that is practically the whole distinction between the case of resale price maintenance, which we charge in 45(e), and the type of evidence which we put on here in the case of C. O. Brown.

It wouldn't be any more illegal if A sold to B and B sold to C and C sold to D and D sold to USG, and USG sold to A and then back to the Dealer. It would still be this price to the dealer which we have charged that they have controlled.

That is our position.

Justice STEPHENS. That is to say, in respect to this board bought by one defendant from another, you contend that the illegal transaction consists of, to take an example, Certain-teed buying from, we will say, USG, or Certain-teed buying from Celotex, just to take an illustration, board manufactured or purported to be manufactured under the licenses, and then reselling that to a dealer at a fixed price?

Mr. STEFFEN. And this evidence as to where they 2897 \* obtained the products from which they made the board is merely preliminary evidence to show that all the board in the Eastern territory which this group has sold, has been sold to dealers.

Mr. BROMLEY. I used to be a school teacher—

Mr. STEFFEN (interposing). I haven't finished, Mr. Bromley.

Mr. BROMLEY. Can I just take this diagram and put it right?

Justice STEPHENS. Just wait, Mr. Bromley, and let Mr. Steffen finish, and then we will have further instruction.

Justice JACKSON. Am I clear on this, Mr. Steffen, or am I stupid—I don't know whether I understood you or whether I am dense. In your bottom graph there—looks like a chemical chain—did you mean to indicate that A, for instance, on the top there, bought board, we will say, from USG?

Mr. STEFFEN. Yes.

Justice JACKSON. And then in turn sold it to the Dealer?

Mr. STEFFEN. Yes.

Justice JACKSON. I thought I understood you to say that even if A had gotten the materials that entered into the board, and they made the board and then sold it to the Dealer that it would be the same—did you mean that?

Mr. STEFFEN. Yes, I meant it would be the same, that there are all sorts of transactions back of the sale 2898 from A to the Dealer, A being Certain-teed in this case, where they got their paper, their gypsum, their starch, or whether they bought the completed board from USG. Those are earlier transactions.

But when we make a charge of monopolizing one hundred per cent of the board sold to dealers, we have to show all of that evidence and we wish to show it for the purposes of, as I say, showing that we have a monopoly here on the sale of all board.



Now I want to make another point. The Presiding Justice also suggested, or rather asked the question to begin with, when Mr. Bromley started, whether or not this evidence might also not be evidence of subterfuge, that is, whether or not we can bring it within the charge. We think we can bring it within the charge directly as being the board that was monopolized.

But even though that was not true, it would still be evidence of subterfuge. That is, if this were to be limited to a conspiracy having to do with board manufactured under the license, which would be the defense that Mr. Bromley wishes you to accept, if they actually sold board which wasn't manufactured under the license at the same price at which they sold board under the license, it would indicate that they were intending to maintain and protect their bul-

letin price, and that probably the whole thing was 2899 put together, I mean the use of the license agreements was done, for purposes of, as we allege, monopolizing the entire business in gypsum board and plaster, and stabilizing the price on all gypsum board. So that it would be relevant, one way or the other, as I see it.

But as far as our main charge is concerned, it seems to me perfectly clear, and we are not to be criticized for not having alleged as a charge that USG sold to Certain-teed, and then Certain-teed sold to the dealer, because I don't think it is illegal. We don't charge that. We charge that the conspiracy fixed the prices on sales to dealers.

Now on paragraph 54, if I may.

In reading 54 literally, it seems to me to mean nothing more than a sort of introductory paragraph to the remaining paragraphs of the complaint. I think, if I ever have anything to do with drafting a complaint, I won't put in such a transition paragraph.

But all it says is that "The period from the latter part of 1926, after U.S.G. had obtained the judgment against Beaver and after the filing of the infringement suits against American and Universal, until the year 1930, was marked by efforts by all of the parties to settle the afore-said litigation, expansion of these efforts into a comprehensive plan for the stabilization of prices in the gypsum industry under the leadership of U.S.G."—then there was 2900 temporary delay in it, and then an eventual adoption of the plan.

Reading the remaining paragraphs, you can see that we spell out in some detail what is referred to there as a sort of general or introductory paragraph.

The plan—Mr. Bromley in his brief, or the defendants in their brief, try to convert “plan” into “combination”, that this is the combination. And that, as I pointed out this morning, is a technical word meaning the charges of the complaint.

The charges of the complaint are made over in '44, and this is merely a description of some of the means and methods.

Suppose we had said, “Now, we would like to introduce the following means and methods.” That is about all it says. They ask us in their bill of particulars—“did you mean any other means and methods than you said you were going to use?” And we say, “No.” And it hasn't changed or limited or expanded our pleadings in any way. It seems to me to be entirely beside the point.

Is that a clear statement?

Justice STEPHENS. We understand your position now.

Mr. STEFFEN. Did you ask concerning 121?

Justice STEPHENS. No, only in connection with 54.

Mr. STEFFEN. Paragraph 121 is met with about the same response. Of course, as I pointed out earlier, 2901 it was only the last sentence of 121 that the defendants asked for particulars upon. The first two, which I have stressed somewhat today, are not affected. They understood those and didn't ask for any particulars concerning the first two sentences.

Justice STEPHENS. It was the contention of Mr. Bromley, as I understood it,—the reason I referred to 121 in my question which I asked on behalf of all three of the Judges,—his contention was that when you read 54 as limited by the bill of particulars, and 121—121, in its reference in the beginning to the control and domination for more than ten years of the manufacture and distribution of 100% of the gypsum board and 80% of the plaster—it refers to the gypsum board manufactured and sold under the licenses, not to the board which was bought and then resold.

Mr. STEFFEN. Well, I think my position is clear on that.

Justice STEPHENS. In view of the introduction of new evidence on the blackboard, we will allow Mr. Bromley to make a further explanation.

*Reply Argument on Behalf of Defendants USG, Avery,  
and Knode*

By BRUCE BROMLEY

Mr. BROMLEY. This analogy isn't a good one, but before I show you what he should have drawn, I want to make sure

that it is understood, if the Court please, that this diagram indicates that USG, owning the patent, has licensed Licensee B to manufacture the patented article and sell it to the manufacturing distributor; and that in the license USG has fixed the price at which Licensee B can sell to the manufacturing distributor; and that so far as this diagram is concerned, the complaint alleges that this purchaser, having purchased the patented article from B, which was made by B, conspired with B to sell to the dealer at a price fixed by this little conspiracy of which this man became a member.

Now that is specifically charged in the complaint.

In order to make an analogy to this situation, I want to change the diagram so as to represent the true fact—

Justice STEPHENS (interposing). Don't rub that out, please. Turn the blackboard over to make a smaller sketch.

Get another blackboard so we can see them both at the same time.

Justice GARRETT. There is only one blackboard in here. I thought we had two blackboards.

Justice STEPHENS. Then turn it over, Mr. Bromley.

Mr. BROMLEY. I guess I can do it by dotted lines.

Justice STEPHENS. All right, if you can.

Mr. BROMLEY. Well, the complaint also charges, of course, that USG itself sells this manufacturing distributor, and that USG and the manufacturing distributor agree that when the manufacturing distributor resells to the dealer he will observe a fixed price. That is charged.

Now down here, USG; instead of—Mr. Steffen wants to prove—instead of selling a manufacturing distributor, sells one of its own licensees, B for instance. USG sells B. B buys the board just like the manufacturing distributor. Then B resells to a dealer. And the allegation is that B, having bought the material, observes the resale price. That is not charged in the complaint.

Mr. STEFFEN. We agree that that is not charged.

Mr. BROMLEY. Does proof of that, Your Honor, in any way tend to prove that this was done? Not at all. So that, not only is it not charged, but it has no probative value and is immaterial to the charge that these gentlemen, the licensor and the licensees, conspired with the manufacturing distributor to fix his resale price. And it won't do to say that because the resale was made by one of the licensees, it

is different from where the resale is made by a plaster manufacturer who doesn't make board, because this licensee here, B, when he buys the board, buys it because he is not making it at that time, at that place. He buys it just like that man does, and his sale to the dealer is just as much a resale as the manufacturing distributor's sale to the dealer.

This situation (indicating) isn't charged. My friend admits it.

This situation (indicating) is charged. It is one of the two instances in the complaint in which the fixing  
2904 of resale prices is charged, manufacturing distributors and resale of metallized board are the two.

This situation (indicating) isn't alleged at all, and can have no bearing, it seems to me, upon whether or not this aspect of the conspiracy existed or was entered into. And, therefore, it must be immaterial.

2905 Justice STEPHENS. Well now, I was once asked by a lawyer who saw me reading books in a law library, when I was a young practitioner, why I read so many law books, and I told him that I couldn't seem to get along without them. He said that he didn't follow that practice himself, but that if he could find one case his way he always quit reading because if he went beyond that he was bound to get confused.

I am confused by having gone a little too far here. Either I have misunderstood a lot, or else I am astonished by Mr. Steffen's admission that this isn't charged, because I thought that this is what we have been arguing about for the last hour and a half, arguing that it was charged.

Mr. BROMLEY. I was equally astonished, but I was pleased as well.

Mr. STEFFEN. May I explain what I meant by that?

Justice STEPHENS. Yes

Mr. STEFFEN. I think I said, to begin with, that I didn't see any offense in the sale by USG, or anything that we should charge as a violation of the Sherman Act, when USG sells to A or to any other co-conspirator, that that is simply a preliminary matter, but when any one of the co-conspirators sells to a dealer at a price agreed upon by all the conspirators, then we say that that is a fixing of prices.

The preliminary transactions between USG and A, or between A and B, are not made an offense, or not  
2906 charged as an offense. The basic offense here is the control of the price to the dealers.



Now Mr. Bromley looks at everything from the standpoint of USG, and he looks right out through the license agreement, and that is all he sees, and he doesn't recognize that USG is just one manufacturer here, from our standpoint. We are looking at them all as co-conspirators, USG included, and that the license agreement is merely a means whereby they have more or less covered up the transaction, as we see it.

And we think that the evidence of sale by USG to A is very important to show that the license agreements were in fact merely a subterfuge because the sales to the dealers are maintained even though they are not under the license agreements, at the same price.

Justice STEPHENS. Suppose we take board not sold by USG but by—

Mr. STEFFEN (interposing). Celotex to Certain-teed?

Justice STEPHENS. To still a third defendant—that is manufactured under the license agreement.

Mr. BROMLEY. Yes, and controlled under the license agreement, and the prices are fixed in the bulletins.

Mr. STEFFEN. We are not quarreling with a sale between Celotex and Certain-teed as such—we are not interested in what transpired between the co-conspirators—but all we are saying is that when they sell to the 2907 dealers they sold at fixed prices.

Mr. BROMLEY. Now that is a very important admission. If my friend admits the USG as the licensor had the right to say to Licensee A, "You may manufacture my patented board but when you sell it to Licensee B you must observe my price", if he admits that is lawful, then by the same token he must admit that when A sells to the dealer at a price fixed by USG, that that is lawful, because there is no difference between a sale by A, who manufactures the board under the patent, to another manufacturer, and a sale by A to a dealer. The prices in both instances are fixed under the license, and if he admits that the one is lawful, it follows automatically that the second must be lawful, there is no difference.

Mr. STEFFEN. Note carefully that I was not speaking of a fixed price between A and B, I didn't go into the question of what price A charged B. I said whatever transpired between the co-conspirators as to their obtaining the board at whatever price, whether they borrow it or whether they buy part from one and part from the other, that that only goes to show the board which they are selling

to dealers and we are interested, and this complaint charges, that when they get ready to sell it to dealers that they sell it at a fixed price.

2908 Justice STEPHENS. Is there anything further on either side?

Mr. OLIVER. I should like to make a very short statement, if I may.

Justice STEPHENS. Mr. Oliver.

*Argument on behalf of defendants The Celotex Corporation and Dahlberg*

By MR. ERNEST H. OLIVER

Mr. OLIVER. It is not my object to get into the general broad discussion. My remarks will be confined solely to perforated lath.

Mr. Bromley, in his argument, referred to the Higgins testimony. In order that the matter may not be overlooked, I do want to call the Court's attention to the fact that Exhibits 333, 334 and 335, which were offered at the time Mr. Baumhoger was on the stand, and referred to in the transcript starting at page 2894—that in so far as those three exhibits were concerned, ruling was reserved as to National, Celotex and Texas, on the question of whether they were binding on these three.

Now our objection at the time was to the fact that neither one of the three had a perforated lath license.

I also want to emphasize that under paragraph 118 of the bill of complaint, as amended by the bill of particulars, neither of these three companies is charged with any  
2909 wrongdoing.

Justice STEPHENS. With any what?

Mr. OLIVER. With any wrongdoing.

Therefore, it seems very clear to me that the testimony concerning perforated lath, as well as those exhibits, could not be binding upon National, Texas and Celotex.

That is all.

Justice STEPHENS. Mr. Finck?

*Argument on behalf of defendants National Gypsum Company and Baker*

By ELMER E. FINCK

Mr. FINCK. If the Court please, on December 20, after I had made a motion on behalf of National and Baker at page 2512 of the transcript, Mr. Knuff stated that he was

not prepared at that time to argue the matter of metallized lath, metallized board, rather, and perforated lath, and your ruling was reserved on our objection, and I was asked to call your attention to it at the time they made their offer of proof.

Now no offer of proof was made regarding perforated lath or metallized board, but I presume that this is the time to renew my objection to all that evidence relating to perforated lath and metallized board, on the same grounds, that it is incompetent, irrelevant and immaterial, and not binding on such defendants; and to renew my motion to strike all such testimony as to such defendants.

2910 Now National was not a party to any perforated lath license agreement, and the complaint does not so charge. As we understand the Government's position with respect to perforated lath, it alleges that certain defendants took out perforated lath licenses, believing the patents to be of doubtful validity, and did so for the sole purpose of having USG control the price.

Now under the bill of particulars, in answer to the request of the defendants—

Justice STEPHENS (interposing). Will you repeat what you just read again, the portion that you read? I missed one point. You started out by saying. "As we understand the Government's position", and you were reading.

Mr. FINCK. I wasn't reading, it may not be accurate, but I will state it again.

Justice STEPHENS. Then let the court reporter read it. He has it.

(Thereupon, the portion of the record indicated was read by the reporter.)

Justice STEPHENS. Thank you.

Mr. FINCK. In the plaintiff's answer, the Government's answer to our request for a bill of particulars, they stated, as to paragraph 54 of the complaint, that they did not intend to charge the defendants with the commission of any acts other than acts referred to in the subsequent

2911 paragraphs of the complaint.

Now this charge regarding perforated lath agreements contained in paragraphs 115 to 120 of the complaint, specifically—or rather the Government specifically, in its bill of particulars, eliminates or excludes National. It is not a question here of extending or adding something to the charge or to the means by which this conspiracy was carried out.

In the case of perforated lath National and other defendants here who did not have a license from USG, were excluded or eliminated from that part of the charges. Now they characterize the paragraphs following paragraph 54 as "charges". Now we certainly haven't prepared to defend against such charges as we were eliminated from.

Finally, I see no reason why we should be involved with all the evidence concerning perforated lath, because even if all that evidence is put in as against us, in the final analysis any decree which this Court might make regarding perforated lath, would not affect us—it couldn't. We had no agreement with USG.

Furthermore, the Government said, "You are not involved in this matter, we except you and others who are not licensees of USG".

Now as to metallized board, National's position is likewise unique. There the Government makes certain accusations as to certain defendants who had agreed with 2912 USG under a license agreement to control the price of board sold by those licensees to others, but, they say, "except National". And we understand the Government's position on metallized board to be that it alleges that USG controlled the resale price of metallized board purchased by certain of the defendants and not manufactured by them.

National, never having purchased any metallized board for resale, could not possibly be connected in any matter whatsoever with such a charge. The control of National's price by USG on metallized board, manufactured and sold by National, was perfectly legal. We had a license, and there certainly is no claim that National had anything whatsoever to do with the alleged control of resale prices of the other defendants. That price, they say, was controlled by USG.

Now in looking at paragraph 114 of the complaint—and this is very carefully drawn, apparently—it says:

"At the time of the execution of said license agreements, none of said licensees, except National, intended to manufacture metallized board (now that is the conspiracy they are talking about, their intent to sell this board, or control the price of board that they did not manufacture) but all of said licensees, except National, intended, as USG well knew, to purchase metallized board from USG or National for resale to dealers and consumers."

Now if they had wanted to include National in this 2913 phase of the case, it would have only taken two



words. They could have said, "as USG and National well knew". They don't say that we knew anything about this conspiracy or about this agreement to buy board from one of the manufacturers under the license agreement under which they did not intend to manufacture.

We went ahead, we equipped our plant, we took a license and spent a lot of money, equipped our plant, made metallized board, and sold it in the regular way, of course under the prices fixed by USG.

Now it seems to me that all the way through they except National. If you will read that paragraph very carefully there was a definite intention on the part of the Government not to include National in that provision, apparently because they thought that probably some evidence might hurt them if they included National.

This part of the case was gone into very, very carefully by the Government, they investigated every contract, every agreement, all of our documents concerning metallized board, and they came to this conclusion, and it is certainly giving it a fair reading, it seems to me, that the intention was to exclude National.

Now it seems very obvious to me that all this testimony relating to metallized board and perforated lath should be stricken from the record as to National and 2914 Baker, and that that evidence has no bearing upon the issues concerning them.

Now I have prepared a list showing the pages and lines of the record where such testimony appears, and I can present that to the Court if it is desired.

Justice STEPHENS. If you will, it will be very helpful.

Mr. FINCK. Otherwise it would take some time to go over it.

(The list referred to was handed to the Court.)

Mr. STEFFEN. May I say just a word?

Justice STEPHENS. Mr. Johnston, do you have something to say?

Mr. JOHNSTON. Yes, I do.

Justice STEPHENS. How many other defendants wish to be heard?

(No response.)

Justice STEPHENS. For how long do you wish to be heard, Mr. Johnston?

Mr. JOHNSTON. About three minutes.

Justice STEPHENS. I don't mean to restrict you, but I have an engagement which I cannot cancel. If you wish to

be heard for ten or fifteen minutes, I will have to ask you to come back tomorrow.

Mr. JOHNSTON. Will the Court be in session tomorrow, or were you going to adjourn until Monday?

Justice STEPHENS. We were going to adjourn at 2915 — least until Monday. We prefer not to have a session tomorrow, because we wish to spend some time in reading, tomorrow.

Mr. JOHNSTON. I can say in a very few sentences what I want to say.

Justice STEPHENS. I don't want to restrict you, but if you can finish in ten minutes, I would appreciate it.

Mr. JOHNSTON. Oh, yes.

*Argument on Behalf of Texas Cement Plaster Company  
and Samuel M. Gloyd*

By Mr. DAVID I. JOHNSTON

Mr. JOHNSTON. The brief that was filed, and what has been said by other counsel for the defendants, go largely also to the position of Texas, as well as other defendants.

In addition to that, and so that there may be no misunderstanding as to our position, on behalf of Texas I now move that all testimony offered on which any ruling has been reserved, and all evidence that has been admitted, both oral and documentary, covering in any manner metallized board and perforated lath, be stricken as not applicable in any way to Texas, not in furtherance of execution of any conspiracy in which Texas would be involved; and not relevant or material or within the issues in this case as to Texas.

And I call the Court's attention now to paragraphs 113 to 120, covering those two subjects, and that Texas is not included in any of those, and the Government 2916 won't even claim that we are.

We were not a licensee under metallized board, and did not handle it, as the Government well knows. And under the bill of particulars we were particularly excluded in both of those sub-heads, because we were not a licensee under perforated lath——

Justice STEPHENS (interposing). Now you are talking about metallized board?

Mr. JOHNSTON. It applies to both.

Justice STEPHENS. What answer in the bill of particulars excludes you from those allegations with respect to both metallized board and perforated lath?

Mr. JOHNSTON. They limit it to the licensees of USG on metallized board and perforated lath, and we were not a licensee, and I think that the motion should be sustained as to Texas on all references to metallized board and perforated lath.

Justice STEPHENS. I have just received notice from my secretary that the engagement which I had, is postponed. So if you have been unduly pressed, please take more time.

Mr. JOHNSTON. That is all I wanted to say.

Justice STEPHENS. Does any other defendant wish to be heard?

Mr. ADAMS?

Mr. ADAMS. I have nothing to add.

2917 Mr. STEFFEN. I can finish in just a moment or two.

Justice STEPHENS. You may take such time as you need. My engagement is postponed.

*Further Reply Argument on Behalf of the United States*

By Mr. ROSCOE T. STEFFEN

Mr. STEFFEN. In regard to Mr. Johnston's point that they did not take out a license under the perforated lath patent, nor one under the metallized board patent, and that therefore they are not in any sense implicated at this point, I think that would all be matter that should more properly be brought out at the conclusion of the case, because we expect to introduce evidence, before we finish, that will show that they did sell metallized board, and that they did sell perforated lath and that they did maintain what we call "conspiracy prices".

So that they are, as we see it, very definitely implicated in the broad conspiracy, and that they were even as respects metallized board and perforated lath.

Justice STEPHENS. You are talking now just about Texas?

Mr. STEFFEN. I am speaking of Mr. Johnston's objections and his motion to strike.

Justice STEPHENS. Will you concede that Texas did not have a license on metallized board or perforated lath?

Mr. STEFFEN. I think that is correct, but our charge, as we have argued, is that all gypsum products are  
2918 brought within paragraph 44, which includes perforated lath, and I might point out that if they didn't have a license, and still maintained the price, that they are probably in a worse position because they don't

even have the defense of the *General Electric* case as applied to their sales of that board, if they followed the price that the conspirators followed.

Now I think that that applies to Mr. Finck's argument on perforated lath, and to sales by National, which Mr. Higgins handled in the Cleveland market.

Mr. Finck states that inasmuch as they did not have a license on perforated lath that therefore these paragraphs, 115 to 120, do not apply to them; and that therefore they are in no sense to be charged with maintaining prices on perforated lath.

Our contention starts the other way, that paragraph 44 includes all types, that they are charged with fixing prices on gypsum products, and even though they didn't have a license, this evidence indicates that they followed the license price, which we charge as being the conspiracy price. So that the exception from these paragraphs does not except them from the charges of the complaint. This paragraph is just a description and it couldn't accurately describe them as being under license because they weren't under license.

Justice STEPHENS. It all goes back, however, does it not, to what is charged in the complaint?

2919 Mr. STEFFEN. That is what we contend, yes, sir.

And the same argument can be made with respect to metallized board. Paragraph 114, which Mr. Finck calls our attention to, says that, "At the time of the execution of said license agreement, none of said licensees, except National, intended to manufacture metallized board", and so forth.

Well, National did manufacture metallized board and did sell it to various licensees, and it also sold to dealers; and National's prices to dealers, USG's prices to dealers, and these licensees' prices to dealers were all uniform, and we contend that that exception does not appear to have any bearing upon the broad charge that they maintained prices generally upon board, inclusive of metallized board.

Justice STEPHENS. It seems to the Court to get back to the same general proposition we have been hearing argument upon all day, as to whether or not the specifications in the complaint, subsequent to paragraphs 44, 45 and 46, limit the complaint.

Do you wish to be heard further, Mr. Finck?

Mr. FINCK. Just to say this, your Honor, that Mr. Steffen seems to think that Mr. Higgins made no distinction be-



tween selling at the same price and selling at a fixed price. I don't believe Mr. Higgins gave any such testimony.

Justice STEPHENS. Distinction between what?

Mr. FINCK. He seems to feel that Mr. Higgins  
2920 stated that he was selling at a fixed price, at a price fixed by somebody else. I don't believe Mr. Higgins made any such statement. Mr. Higgins, as I remember his testimony, said that he sold perforated lath at 25 cents above the price of regular lath, and then he also stated that that was in line with the competitive prices in that district. That is all that he said.

Mr. STEFFEN. I think that is accurate, and that is what I intended to imply.

Justice STEPHENS. And I am correct, am I not, Mr. Steffen, that this argument of Mr. Johnston's and Mr. Finck's all goes back to the general question as to whether or not the charges in paragraphs 44, 45, 46 and 54 are limited by what follows, and the bill of particulars?

Mr. STEFFEN. We don't pick out 54 as making any charges at all.

Justice STEPHENS. Well, paragraphs 44, 45 and 46, then.

Mr. STEFFEN. That is right.

Mr. FINCK. I don't quite take that position. I say that whether that is a part of the charge or whether it is the means, that we have been excepted in either case.

Justice STEPHENS. I see.

Justice GARRETT. I am still perplexed somewhat about this statement in article 3 of the bill of particulars with respect to paragraph 54 of the complaint. I have tried to follow the argument of counsel closely because that  
2921 had come under my observation several times in trying to study this case.

I take it that the meaning to be given to article 3 of the bill of particulars, or the statement in article 3, is to turn on the construction that is to be given paragraph 54. Now Mr. Bromley's argument on that impressed me at one time as being broad enough to mean that that language in article 3 wiped out everything in the complaint before paragraph 54 of the complaint. It was not intended, I suppose, Mr. Bromley, to make that argument, was it?

Mr. BROMLEY. No, sir, it merely limits it.

Justice GARRETT. We have got to construe paragraph 54, haven't we, in order to determine the meaning of the language in article 3 of the bill of particulars?

Mr. BROMLEY. Yes, sir, and I desire to point out to your Honor that the Court, in stating the question which he ordered the Government to answer, said:

"State whether or not the allegations of paragraph 54 of the complaint are intended to charge the defendants with the commission of any acts other than the acts referred to in other paragraphs of the complaint, and if the allegations are so intended, identify and describe each such act".

Now it was in answer to that order of the Court, that is to say, "Did paragraph 54 intend to charge any acts other than those alleged elsewhere in the complaint, 2922 whether before or after?"—that the Government answered, "The allegations of paragraph 54 of the complaint are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint".

So I didn't mean to say that paragraph 54, or the bill of particulars, wipes out all the rest of the complaint. I meant to say merely that paragraph 54 did not enlarge the specifications of the complaint.

Justice STEPHENS. What I understood you to say was that when you read paragraph 54 with the bill of particulars, it confines the complaint to the acts enumerated subsequent to paragraph 54?

Mr. BROMLEY. That is exactly what I intended to say, yes, sir.

Justice GARRETT. That makes your position clear. I think I understand Government counsel's position on it.

Justice STEPHENS. Mr. O'Donnell, we have been expecting Mr. Tomkins on Monday—

Mr. O'DONNELL (interposing). I have stated to him that he would be called the first thing Monday morning.

Justice STEPHENS. In view of the fact that all of this day is gone, and that I have a Patent Interchange Committee engagement Saturday, and we have so much reading to do, and forty-seven reserved rulings to go through, and 2923 be sure we read all the proceedings in subsequent pages, we are very doubtful whether we can be ready to resume until Wednesday morning. Will that be all right with Mr. Tomkins?

Mr. O'DONNELL. I will contact Mr. DeWitt this evening, and have him get hold of Mr. Tomkins just as soon as possible. Could I inform the Court sometime tomorrow whether or not Mr. Tomkins can be here on Wednesday? It is not a matter of personal convenience with him at all. It would only be a question of whether or not certain war commitments which are of great importance might have him tied up on those days.

Justice STEPHENS. Would his testimony involve some more reserved rulings?

Mr. KNUFF. Definitely

Justice STEPHENS. We are not going to get into them. We cannot get ready to rule on these matters by Monday morning, that is certain. We had thought, during the noon hour, that perhaps we might be able to resume on Tuesday morning. But I think you had better arrange with Mr. Tomkins to be here Wednesday morning, and if he cannot be here at that time, can you have another witness, Mr. Steffen?

Mr. STEFFEN. We may be able to, your Honor.

Mr. O'DONNELL. How soon would the Government like to be notified as to whether or not Mr. Tomkins can be here Wednesday?

Mr. STEFFEN. As soon as possible.

Mr. O'DONNELL. I will try to call you this evening.

Justice STEPHENS. It is immaterial, you do not  
2924 need to let us know, we are not going to resume session until Wednesday morning. This apparently is an important matter, and we want to rule upon it soundly and advisedly. So either have Mr. Tomkins here Wednesday morning or notify the Government that he cannot be here so that they can get someone else.

One other thing. I am not sure that we have in our possession, Mr. Bromley or Mr. Steffen, the motion for the bill of particulars. We have the answer.

Mr. KNUFF. I believe that was to be supplied by the defendants.

Justice STEPHENS. Yes, I think it was.

Mr. KNUFF. We have one copy and that is our only copy, our file copy.

Justice STEPHENS. We ought to have the motion for the bill of particulars and the Court's order and the answer.

Mr. KNUFF. I can give you all the answers you want, I have a lot of those.

Justice STEPHENS. We have those, too, plenty of them, thank you. Have you gentlemen for the defendants any of these documents?

Mr. BROMLEY. We have them all and we will furnish copies to each of your Honors tomorrow morning.

Justice STEPHENS. Thank you very much. If you can do so, we would appreciate it.

If there is nothing else, we will adjourn until  
2925 Wednesday at ten o'clock.

(Thereupon, at 4:25 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Wednesday, January 26, 1944.)

2935. IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
WASHINGTON, D. C., MONDAY, FEBRUARY 7, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

2942      Going now to the reserved rulings; the Court calls Mr. Finck's attention to the fact that at Transcript 2539 his objection was made in terms of "any violation of a metallized board license agreement". The Court thinks he may wish to correct that to read, "violation of law in connection with a metallized board license agreement".

Mr. FINCK. I do, Your Honor.

Justice STEPHENS. You may wish to look at that and suggest a rephrasing of your objection.

Mr. FINCK. Thank you very much. I haven't my records with me.

Justice STEPHENS. Will you make a note of that?

Mr. FINCK. Yes.

Justice STEPHENS. Also, Mr. Finck's attention is called to the fact that at many places in the record—for example, Transcript 2539—his objection is phrased in terms of



National only, and not in terms of National and Baker; and Mr. Oliver's attention is called to the fact that his objections are frequently made only in terms of Celotex, rather than in terms of Celotex and Dahlberg.

Counsel for the defendants may wish to have the record show that wherever an objection has been made in behalf of a corporate defendant whose officer or officers are also defendants, the objection is to apply to the individual officer or officers as well as to the corporate defendant.

The Court is referring in this last statement to counsel for all the defendants.

Mr. BROMLEY. We should like, if we may, to have that understanding, if the Court please.

Justice STEPHENS. That may be the understanding.

The record will also show that wherever the Court has made a ruling in respect of any corporate defendant, the ruling applies also to the individual officer or officers of that corporate defendant.

The Court is of the view, Mr. Finck, that you ought to put into the record, in the form of a record of your objections or the basis of your objections, the list of questions and answers and exhibits relating to metallized board and perforated lath which you furnished to the Court and we assume also to counsel. The Court is making a ruling this morning in terms of it, and in terms, of course, of other reserved rulings, but it seems to the Court that it ought to go into the record so that the record will show you are calling the Court's attention to the exhibits and items of testimony referred to on this paper.

Mr. FINCK. I can do that, Your Honor. I haven't served the other counsel with a copy of that. I originally prepared that simply for the Court's convenience. I would be glad to put it in the record.

Justice STEPHENS. It is very true that it was prepared for the Court's convenience. Mr. Finck had a running objection, you will remember, to certain lines of testimony, and the Court asked him, for the convenience of the Court, to furnish a list of the pages on which all of those rulings were made, and accordingly he did so, and we have used it to aid us in locating the places in the record at which the reserved rulings were made. But we thought it would be desirable to have it in the record so that the Court's reference to it in its rulings which are about to be made would appear to have a basis suggested by counsel.

Mr. STEFFEN. I should like the record to show that we

have not seen the memorandum, nor have we, therefore, had an opportunity, perhaps, to look at all of these things.

Justice STEPHENS. It is not a memorandum, but since the Government has not seen it—the Court supposed it had—the Court will hand it to the Government now. It would appear that it is merely a list of pages. If you wish, however, to examine them before the Court makes its ruling this morning, you may do so.

If it is copied in the record from this copy I have here, the Court Reporter is directed to copy it into the record without the penciled notations, because they are merely for the convenience of the Court.

I think you will find, Mr. Steffen, it is nothing you need to concern yourself about, but you are entitled to take time to reassure yourself on that subject if you wish 2945 to.

Mr. FINCK. If the Court please, if this is the time you desire to have me submit this statement, I would be very glad to submit it as a part of the motion which I made to strike out various parts of the testimony.

Justice STEPHENS. The record may show your offer to do so, and the Court will wait until Mr. Steffen has examined it before directing that it be copied into the record.

Mr. STEFFEN. I have looked at it, and it appears to be a list of pages at which there were reserved rulings. We have not, of course, had an opportunity to check back to see what rulings were in issue, and so on.

Justice STEPHENS. It is correct, Mr. Steffen. I have looked personally at every page, and it is a correct statement as far as it goes. There might be others, of course, that Mr. Finck might have missed, but the Court itself kept a record of every reserved ruling, and merely wanted to have it checked by counsel on either side if they wished to furnish a list. I think no possible harm can come to the Government by having it introduced as a basis for checking the record, which is all that it is; but if you wish to take an exception to it later, you may do so.

The Marshal will distribute to each of the counsel present one of these copies of rulings about to be announced, and then return any that are left over to me.

2946 (The documents referred to were distributed to counsel by the Marshal.

Justice STEPHENS. The Court will direct the reporter to copy into the record the list of questions and answers and exhibits relating to metallized board and perforated lath, presented by the National Gypsum Company through

Mr. Finck as a part of Mr. Finck's continuing objection or as a basis therefor.

(The list referred to is as follows:)

# NATIONAL GYPSUM COMPANY

## LIST OF QUESTIONS AND ANSWERS AND EXHIBITS RELATING TO METALLIZED BOARD AND PERFORATED LATH

Page 930—METALLIZED BOARD LICENSE received in evidence.

Page 932—PERFORATED LATH AGREEMENTS received in evidence.

Page 938—PERFORATED PRICE BULLETINS received in evidence.

Page 1828—lines 24, 25

" 1829 " 1 and 2, 7 through 25

" 1831 " 14 through 16

" 1835 Exhibit 208 received in evidence refers to Metallized Board.

" 2206 lines 12 through 25

" 2207 " 1 through 5

" 2212 Exhibits 244, 245 and 246 received in evidence. Refers to Metallized Board.

" 2217 lines 22 through 25

2947 " 2218 lines 1 through 9, 22 through 24

" 2224 Exhibits 247 and 248 received in evidence. Refers to Metallized Board.

" 2227 Exhibits 249 through 253 received in evidence. Metallized Board Price Bulletins.

" 2239 Exhibit 254 received in evidence. Refers to Metallized Lath.

" 2239 lines 23 through 25

" 2240 " 1 through 13

" 2241 Exhibits 255 and 256, relating to Metallized Lath, received in evidence.

" 2274 Exhibits 258 through 266, relating to Metallized Board Invoices Certain-teed Products Co., received in evidence.

" 2275 lines 20 through 23

" 2276 " 25

" 2277 " 1 through 4

" 2277 " 20 through 23

Page 2282 lines 4 through 8, 20 through 25  
 " 2283 " 1 through 8  
 " 2309 Exhibit No. 269 relating to Perforated Lath, received in evidence.  
 " 2406 Exhibit 287 received in evidence, refers to Metallized Board.  
 " 2409 lines 24 and 25  
 " 2410 " 1 through 17  
 " 2411 Exhibit 288 received in evidence, refers to Metallized Board.  
 " 2412 lines 2 through 25  
 " 2413 " 1  
 2948 " 2415 Exhibit 289 received in evidence, refers to Metallized Board.  
 " 2416 Exhibit 290 received in evidence, refers to Metallized Board.  
 " 2416 lines 15 through 23  
 " 2418 Exhibit 291 received in evidence, refers to Metallized Board.  
 " 2419 lines 1 through 25  
 " 2420 " 1 through 25  
 " 2421 " 1 through 25  
 " 2422 " 1 through 17  
 " 2425 " 14 through 22, 24, 25  
 " 2426 " 1 through 8  
 " 2437 " 14 through 25  
 " 2438 " 1, 22 through 25  
 " 2439 " 1 through 13  
 " 2444 Exhibit 292 received in evidence, refers to Metallized Board.  
 " 2445 lines 5 through 23  
 " 2446 Exhibit 293 received in evidence, refers to Metallized Board.  
 " 2447 Exhibit 294 received in evidence, refers to Metallized Board.  
 " 2448 Exhibit 295 received in evidence, refers to Metallized Board.  
 " 2448 lines 13 through 22  
 " 2450 " 20 through 25  
 " 2451 " 1 through 25  
 2949 " 2452 " 1 through 25  
 " 2453 " 4 through 14, 19 through 25  
 " 2454 " 1 through 5, 24 and 25  
 " 2455 " 1 through 25  
 " 2456 " 1 through 11



- Page 2564 Exhibit 308 received in evidence, refers to Metallized Board.
- " 2653 Exhibit 313 received in evidence, refers to Perforated Lath.
- " 2660 Exhibits 314 and 315 received in evidence, refers to Perforated Lath.
- " 3037 through 3041—Testimony by Witness Higgins relating to Perforated Lath.
- RESERVED RULINGS
- " 2542 Exhibits 300 and 300-A, relating to Metallized Board.
- " 2547 Exhibit 301, relating to Metallized Board.
- " 2895 Exhibit 333, relating to Perforated Lath.
- " 2898 Exhibit 334, relating to Perforated Lath.
- " 2899 Exhibit 335, relating to Perforated Lath.

Justice STEPHENS. Now the Court will announce its rulings on the reserved rulings, and for the convenience of counsel the Court has had prepared, through the Court Reporter, a copy of what it is about to read from. The matters are of such importance and underlie so many of the rulings and classes of testimony presented that the Court has prepared its rulings in writing.

2950 The rulings consist first of a statement of the views of the Judges upon the various questions of law presented, and then it is followed by an actual ruling on each of the items on which rulings have been reserved.

For the convenience of counsel the Court has had three copies, which are now in your hands, prepared by the Court Reporter, and the Court Reporter will copy into the record what the Court is about to read.

The Court will read this out loud, announce the ruling out loud, in spite of the fact that it will take some little time to read it, because counsel ought to be advised of the rulings and of the reasons for the rulings in order that they may be guided with respect to the further testimony to be taken today and following in the case.

2951 RULINGS OF COURT ON RESERVED RULINGS

The Court will now rule upon all objections and motions in respect of which rulings have been reserved.

This does not include rulings as a result of which evidence was received subject to connection. There will first be stated the views of each of the judges upon the points argued. For convenience this statement will be made in terms of five topics. Following this statement of the views of the judges an announcement will be made of the actual ruling of the court, according to the majority view, on each of the reserved rulings.

## STATEMENT OF THE VIEWS OF THE JUDGES

### I.

Admissibility of evidence concerning gypsum board and other gypsum products asserted to have been purchased by one defendant from another and thereafter resold at bulletin prices (Offers of Proof Nos. 1 to 5 inclusive).

In the opinion of Judge Garrett and Judge Jackson the complaint is sufficient to warrant the introduction of such evidence. Their views are as follows: The broad charges in paragraphs 44, 45 and 46, together with paragraph 121, would render the complaint sufficient as against a general demurrer.

If, under the charges contained in the aforementioned paragraphs, it was not clear to the defendants as to everything they would have to defend against, their remedy was by a motion for a bill of particulars. In such a motion they requested particulars concerning paragraphs 44, 45 (c) and (d), and 121 of the complaint, among other paragraphs, as to the meaning of the term "miscellaneous gypsum products," and the bill of particulars specified such products to be and include gypsum block, gypsum tile and Keene's cement.

Further answering the motion concerning other allegations of paragraph 121 that "the defendants have standardized the manufacture of board, have limited said distribution of board to themselves and to certain manufacturing distributors, and have completely eliminated from the distributive system wholesale distributors who might fail to maintain said prices," the Government answered that such allegations were "not intended to charge the defendants with any acts in addition to the acts with the commission of which the defendants are charged in other paragraphs of the complaint."

The bill of particulars with respect to paragraph 54 is

confined to the allegations in that paragraph and in no way narrows the scope of the general charge.

The complaint fairly apprizes the defendants of the charges made against them as alleged violators of the Sherman Act, and the bill of particulars does not so limit the proof under the complaint as to render the evidence sought to be introduced by the Government in accordance with its Offers of Proof Nos. 1 to 5, inclusive, improper.

Judge Stephens is of the opinion that the charge of the complaint does not include an agreement to fix resale prices on purchased board and other gypsum products.

2953 His views are as follows: While there are authorities which seem to support the contention of the Government that it is the conspiracy as a whole that is charged and that all of its details may be *proved* as part of the charge so that they may be restrained, although they need not, indeed could not conveniently, be stated in a complaint, the detail of the present complaint when read in the light of the bill of particulars makes this theory and these authorities inapplicable. The bill of particulars states concerning paragraph 54 of the complaint that the allegations thereof (charging an expansion of the efforts of the parties "into a comprehensive plan for stabilization of prices in the gypsum industry under the leadership of U. S. G., temporary delay in the execution of this plan with a resulting intensification of price competition in the industry, and eventual adoption of the plan by every important board manufacturer in the Eastern area.") "are not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint." The authorities cited by the defendants reflect a rule of pleading, applicable even under the new rules, that general allegations must be considered in the light of more detailed and specific ones and are limited thereby. Whether or not the general charging paragraphs preceding 54 may be said to state a cause of action good against general  
2954 demurrer, they are limited by the detail of the paragraphs succeeding paragraph 54. The only resale price fixing in terms referred to in the complaint is that of manufacturing distributors and that in respect of metalized board. The bill of particulars in respect to paragraph 54 clearly told the defendants that they were not charged under the complaint with any acts other than those mentioned in the subsequent paragraphs.

Judge Stephens is of the further view, however, that evi-

dence of fixing resale prices on purchased products is admissible to prove the charge, or a part thereof, that in his view is made in the complaint although in his view, as above stated, the charge does not include such resale price fixing. Judge Stephens' views on this subject are these: The charge that is made in the complaint includes a charge that the defendants conspired and contracted with each other to fix prices, using patent license agreements as a cloak, on board purported to be manufactured under the patents. Such a conspiracy or agreement must, in the ordinary course, be proved out of circumstances. The defendants admit that the prices were fixed by U. S. G. on board manufactured under the patents, but they do not admit that they agreed or conspired together for such fixing of prices. The offered proof of price fixing upon purchased products may in connection with other evidence have some probative value as a circumstance to show a conspiracy to fix prices through license agreements as a cloak upon board manufactured under the patents—this on the analogy of proof of "other offenses" in a criminal case to show a common scheme or plan embracing the commission of two or more wrongs so related to each other that proof of one tends to establish proof of the others. See *Martin v. United States*, 75 U. S. App. D. C. 399, 402, 127 F. (2d) 865, 868 (1942). If the Government can show an agreement among the defendants to fix prices on purchased products, this may support an inference of an agreement with respect to the fixing of prices upon manufactured board. The inference may be alone far from conclusive proof but it cannot be said that it is so remote as to be immaterial and irrelevant and hence the evidence inadmissible. It may be urged by the defendants in this connection that purchased board, being the very board manufactured under the patents, would naturally take, for economic reasons, the same prices as the manufactured board in the market—that the price fixing by U. S. G. under the patents, on the manufactured board, was legal and hence the natural economic consequence is legal and is not evidence of anything illegal. But to the contrary the Government contends that it can show the whole arrangement charged to be not a lawful price fixing under patent license agreements but an agreement to use patents as a cloak, and that this is what caused the price stabilization on the manufactured board. To decide the admissibility of the proffered evidence of price fixing on purchased board by taking one or the other of these two posi-



tions would be to rule upon questions of substantive law and fact in the case before the close of the case. Each party is entitled to introduce evidence relevant under its own theory of the case and cannot be forbidden, upon the insistence of the opposite party that its theory of the case be accepted and the evidence in consequence shut out, to do this.

Therefore the evidence proffered by the Government of price fixing on purchased board and on other purchased products is admissible, in the view of Judge Garrett and Judge Jackson because resale price fixing on purchased products is within the charge; in the view of Judge Stephens because it is a circumstance which in connection with other evidence may support the charge, or a part of the charge, that he thinks is made even though in his view that charge does not include an item of resale price fixing on purchased products.

## II.

Admissibility of evidence concerning perforated lath (motions to strike off National, Celotex and Texas).

In the opinion of Judge Garrett and Judge Jackson the motions to strike should be denied. Their views are as follows:

First, in respect of evidence relating to perforated lath manufactured under National's own patent. Even though National had a legal right to manufacture and sell under its own perforated lath patent, if the Government can show that it sold at the same price as that at which perforated lath generally was sold, that may be some evidence that National was a party to a conspiracy with reference to the sale of perforated lath at fixed prices. That is to say, the Government is entitled to try to prove that National violated the Sherman Act by joining a conspiracy in respect of perforated lath through the use of its own perforated lath patent although it did not itself have a license from U. S. G.

Second, in respect of evidence relating to perforated lath manufactured and sold by other defendants under U. S. G. licenses. As against National evidence generally concerning perforated lath manufactured and sold by other defendants, who did have perforated lath licenses from U. S. G., at bulletin prices is admissible on the theory that if there was a general conspiracy in respect of perforated lath, even though National did not have a license itself from U. S. G., still, if it was a member of the conspiracy,

it would be bound by the acts of the other conspirators. As against Celotex and Texas the same is true even though it is conceded that they had no perforated lath licenses from U. S. G. The Government is entitled to prove under the complaint a conspiracy by those defendants who did have perforated lath licenses from U. S. G., and if 2958 the Government can show that Celotex and Texas were parties to the general conspiracy, then they may be bound even though they did not have perforated lath licenses themselves.

Judge Stephens is of the opinion that the motions to strike of National, Celotex and Texas should be granted. His views are as follows: Paragraphs 115-120 of the complaint are the only ones which charge violations of law, in terms, concerning perforated lath. The bill of particulars answering paragraph 54 of the complaint states that it is "not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint." The court's order for a bill of particulars said: "TENTH: State whether it is intended by the use of the expression 'all of the licensees of U. S. G.' in the last sentence of paragraph 118 of the complaint to refer to the licensees named in paragraph 89 of the complaint or whether it is intended by the use of such expression to refer to the licensees of the licenses to manufacture perforated lath referred to in the first sentence of said paragraph 118." The bill of particulars, paragraph X, said: "The phrase 'all of the licensees of U. S. G.' appearing in the last sentence of Paragraph 118 of the complaint, refers to the licensees of U. S. G. under the perforated lath patent, as set forth in Paragraph 117 of said complaint." Paragraph 117 does not name Na- 2959 tional, Celotex or Texas. It names American, the assets and stock control of which are asserted to have been acquired by Celotex; but the complaint does not charge that Celotex assumed American's perforated lath license. At Tr. 3223-5 Mr. Oliver for Celotex asserted that Celotex had no perforated lath license, and the Government conceded this. And the Government conceded also at the same place in the transcript that Texas had no perforated lath license. The Government elsewhere conceded (Tr. 2513) that National had no perforated lath license from U. S. G.

Since National, Celotex and Texas are not mentioned in paragraph 117 and are therefore not within the licensees

referred to in the last sentence of paragraph 118, the Government has in its complaint not charged the defendants National, Celotex or Texas with any violation of law in respect of perforated lath either in terms or upon the theory that they might be bound by the acts of other defendants even though they had no perforated lath licenses themselves. In respect of National the foregoing applies so far as its manufacture and sale of perforated lath under its own patent is concerned.

### III.

Admissibility of evidence concerning metallized board (the objection and motion to strike of National).

In the opinion of Judge Garrett and Judge Jackson the objection should be overruled and the motion to 2960 strike denied. Their views are as follows:

First. The bill of particulars does not so narrow the charge as to exclude National from that portion which concerns metallized board.

Second. Even if the complaint was construable as not specifically charging National as having participated actually in the metallized board transactions, nevertheless if National can be shown to have participated in the general conspiracy charged against the other defendants and if that can be shown to involve metallized board transactions, then it would be bound as a co-conspirator.

Judge Stephens is of the opinion that the objection and motion to strike of National should be granted. His views are as follows:

Paragraphs 113-114 of the complaint charge all of the defendants with taking licenses for metallized board but charge also that none except National intended to manufacture such board but on the contrary to purchase the same from U. S. G. or National; and further charge that this was well known to U. S. G., and that U. S. G. nevertheless required the execution of those agreements and determined and fixed the price of resale of metallized board notwithstanding that it knew and that the fact was that most of the board was purchased from U. S. G. and National.

National urges as follows: (1) The bill of particulars in respect of paragraph 54 of the complaint states that it is "not intended to charge the defendants with the commission of any acts other than the acts referred to in subsequent paragraphs of the complaint."

(2) Paragraphs 113-114 do not include, but indeed except,

National. The gist of the charge is that there was an agreement to sell metallized board purchased from U. S. G. and National at prices fixed by U. S. G. But it is not charged that National purchased any board and it is not charged that it knew (as it is charged that U. S. G. did) that despite the licenses to manufacture board the board was actually to be purchased from U. S. G. and National for resale at U. S. G. prices. These contentions by National are correct. Accordingly National was not charged with any violation of law in respect of metallized board, and is indeed eliminated from complicity in any such violation.

#### IV.

Admissibility of evidence concerning metallized board (motions to strike of Celotex and Texas).

With respect to Celotex, Judge Stephens, Judge Garrett and Judge Jackson all agreed that the motion to strike of Celotex should be denied. Their views are as follows: The allegations of paragraphs 113-114 do not exclude Celotex. Those paragraphs refer to "licensees." "Licensee" is defined in paragraph 89 so as to include Celotex. Paragraph 89 provides: "89. Where the word 'licensee' 2962 is used hereinafter it shall be deemed to include National, Certain-teed, Ebsary, and Texas throughout the period from the formation of the combination as aforesaid to the date of filing this complaint; American, Universal, Atlantic, and Kelley Plasterboard from the time of the formation of said combination to the respective dates of dissolution of said companies as aforesaid; the defendant Celotex from the date of its acquisition of American as aforesaid to the date of filing this complaint; and the defendant Newark from the date of its acquisition of Kelley Plasterboard as aforesaid to the date of filing this complaint." Therefore Celotex is, despite the answer to paragraph 54 of the bill of particulars, included within the charge of resale price fixing on metallized board—because the acts charged in respect of that are charged so broadly in paragraphs 113-114 (i. e., in paragraphs subsequent to paragraph 54) as to include Celotex. Moreover, Mr. Oliver for Celotex conceded at Tr. 3223-5 that Celotex had a metallized board license, that is, that it had assumed the obligations of American's license.

With respect to Texas. At Tr. 3224 Mr. Johnston for Texas asserted that Texas did not have a metallized board license and this was conceded by the Government. Judge



Garrett and Judge Jackson are nevertheless of the opinion that the motion to strike of Texas should be denied. Their views in respect of Texas are: For the reasons stated above in respect of Celotex the allegations of paragraphs 113-114 do not exclude Texas. And even though Texas did not have a metallized board license it might be bound by the acts of the other defendants concerning metallized board if shown to be party to the general conspiracy charged.

Judge Stephens is of the view that the motion to strike of Texas should be granted because of the concession of the Government that Texas did not have a metallized board license. His views are: A defendant not having a metallized board license is not within the charge in paragraphs 113-114 for that charge is that *licensees* took licenses but purchased from U. S. G. and National and then resold at prices fixed by U. S. G.; hence, if Texas had no license for metallized board it is outside the charge, i. e., is not charged with any violation of law in respect of metallized board.

## V.

Admissibility of evidence concerning resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors (the objection to, and motion to strike, the Orin F. Perry, Jr., testimony).

Judge Stephens, Judge Garrett and Judge Jackson all agree that the objection should be sustained and the motion to strike granted. Their views are: There is no charge in the complaint of resale price fixing on plaster, board and other gypsum products by wholesalers, as distinguished from manufacturing distributors.

## 2964 THE RULINGS OF THE COURT, BY VIRTUE OF THE MAJORITY VIEWS EXPRESSED, UPON THE RESERVED RULINGS

1. Gypsum products asserted to have been purchased by one defendant from another and thereafter sold at bulletin prices.

The testimony on this subject commences at Tr. 2144 in relation to the North Holston plant transaction. At Tr. 2148 Exhibit U. S. 239, at Tr. 2149 Exhibit U. S. 240, and at Tr. 2150 Exhibit U. S. 241 were marked and identified. At Tr. 2153-4 Mr. Bromley for the defendants ob-

jected to this class of evidence and moved to strike. At Tr. 2154-6 there is a statement by Mr. Steffen concerning the purpose of this evidence and concerning its asserted relevancy. At Tr. 2201 the court ruled that the evidence concerning the North Holston plant transaction was not admissible. At Tr. 2233 Mr. Bromley pointed out that the motion to strike (Tr. 2153) had not been ruled upon, and the court stated that it did not make a ruling on the exhibits (Exhibits U. S. 239, 240, 241) because the Government was proposing to make an offer of proof, and the court left the ruling on the motion to strike unacted upon until the offer of proof. At Tr. 2313-17 there are identified Exhibits U. S. 271, 272, 273, 274, 275, 276 and 277. All of these exhibits involve, including Exhibits U. S. 239, 240 and 241, the Government's contention that it has a right to prove as part of the charge in the case that the 2965 defendants by agreement bought gypsum products from each other and thereafter resold them at bulletin prices. The actual offers of proof which appear at Tr. 3110-13 inclusive, include, however, only Exhibits U. S. 241, 274, 275, 276 and 277. The court therefore treats all of the others as not offered. There remains for the court to make a final ruling upon the admissibility of the exhibits last listed, and upon the admissibility of the evidence concerning them and concerning the asserted purchase of gypsum products by the defendants from each other and the asserted resale thereof at bulletin prices. Exhibits U. S. 241, 274, 275, 276 and 277 all relate to the purchase of gypsum products from U. S. G. by Certain-teed at different places.

The ruling on these exhibits is as follows: Exhibits U. S. 241, 274, 275, 276 and 277 are received in evidence. The testimony relating to them is received in evidence. The objection of Mr. Bromley at Tr. 2153 is overruled and his motion to strike at that page is denied, the court reversing its ruling at Tr. 2201 as to Exhibit U. S. 241 and the testimony there referred to. As to Offers of Proof Nos. 1 to 5 inclusive, the court rules that the Government is permitted to make the proof described.

At Tr. 2439-42 in the examination of the witness Neale questions were asked and answered concerning the purchase by Atlantic from other companies during 1934-5-6 of non-metallized board and lath. At Tr. 2442 the 2966 objection by Mr. Bromley to this testimony was sustained; and a motion to strike by Mr. Bromley was granted. Thereafter at Tr. 2443 it was ruled that the

answers might be allowed to stand; the ruling on the motion to strike being deferred until the Government's offers of proof were made.

Consistently with the previously stated rulings on this class of evidence, the action of the court is reversed, that is to say, the objection of Mr. Bromley is overruled and his motion to strike is denied.

## 2. Metallized board and perforated lath.

At Tr. 2512-19 Mr. Finck made a continuing objection for National and Baker to evidence concerning metallized board and perforated lath, the objection reaching all evidence introduced by the Government relating to such board and lath, upon the ground that it is incompetent, irrelevant and immaterial and has no bearing on the issues as between the Government and National and Baker. Argument on this topic followed and at Tr. 2517 the continuing objection was renewed and recorded and the ruling deferred.

At Tr. 2519 Mr. Johnston adopted the same objection for Texas in respect of both metallized board and perforated lath, and that objection was recorded and the ruling deferred.

The objections are overruled. This ruling applies 2967 both to the objection of Texas and to the objection of National and Baker.

Tr. 2538-46. Exhibit U. S. 300 (a letter from Baker to Black) and Exhibit U. S. 300a (a letter from Mr. Finck to National) concerning metallized board. These two exhibits were offered in evidence by the Government at Tr. 2539 and at that page Mr. Finck objected upon the ground that as to National, it not having been charged in the complaint with any violation of law in connection with a metallized board license agreement, the exhibits are immaterial. At Tr. 2541 the court recorded the objection and deferred the ruling until the Government's offer of proof. At Tr. 2542 the recording of the objection and the deferring of ruling were repeated and on that page Mr. Bromley objected for all of the other defendants, i. e., other than National, on the ground that the two exhibits were incompetent and immaterial because not declarations of alleged co-conspirators, the objection being upon the ground that neither National nor Celotex is charged so far as metallized board is concerned. Both objections are overruled, and the exhibits are received in evidence.

Tr. 2546-7. Exhibit U. S. 301 (a letter from National to Black of American concerning "foil license") and Ex-

hibit U. S. 302 (a letter from American to Burley of National on the same subject). The exhibits are offered on Tr. 2546. Mr. Finck objected for National at 2968 Tr. 2547 upon the ground that the exhibits are incompetent and immaterial and have no bearing on any of the issues as between the Government and National or Baker. The court recorded the objection and deferred the ruling until the offer of proof by the Government. The objection is overruled and the exhibits are received in evidence.

Tr. 2653. Exhibit U. S. 313 (a memorandum from Henley of Certain-teed to Whittemore of Certain-teed with reference to perforated lath). This exhibit was offered and received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators, but then Mr. Finck objected that it was immaterial as to National because it refers principally to perforated lath. The court recorded the objection and stated that it would be within the group of deferred rulings. The objection is now overruled.

Tr. 2657-60. Exhibit U. S. 314 (a memorandum from Henley of Certain-teed to Whittemore of Certain-teed concerning perforated lath) and Exhibit U. S. 315 (a memorandum by Henley of Certain-teed to Whittemore of Certain-teed concerning perforated lath). At Tr. 2657 these exhibits were marked for identification. At Tr. 2660 these exhibits were received subject to the usual reservation with respect to declarations of alleged co-conspirators. The continuing objection of Mr. Finck for National was recorded and a similar objection by Mr. Johnston for Texas, 2969 and the court deferred ruling on these two objections. The objections are overruled.

Tr. 2892-96. Exhibit U. S. 333 (a memorandum by W. C. Baumhoger of Certain-teed to the members of the management board of that company in relation to perforated lath). At Tr. 2892 this exhibit was marked for identification; at Tr. 2893 it was offered in evidence; at Tr. 2894 Mr. Bromley made only the "usual" objection, i. e., the objection that the exhibit is not binding on alleged co-conspirators unless a conspiracy is shown, and the declaration be in furtherance or execution of the conspiracy. Mr. Finck objected for National and Baker to the admission of the exhibit on the ground that it was irrelevant, incompetent and immaterial and not binding on the defendants National and Baker and that there is no charge in the complaint of any violation of law on the part of National



and Baker in the manufacture and sale of perforated board. The same objection was made by Mr. Johnston for Texas and by Mr. Oliver for Celotex. The court reserved the ruling so far as the companies which did not have a license to manufacture perforated lath are concerned, National, Celotex and Texas; otherwise the exhibit was received in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators. These objections are all overruled.

Tr. 2896-98. Exhibit U. S. 334 (a memorandum from Van Hagan of Certain-teed to Baumhoger of Certain-teed concerning perforated gypsum lath). The exhibit was offered at Tr. 2897. Mr. Bromley made the "usual" objection for all defendants; Mr. Finck objected on the part of National on the basis of his continuing objection to testimony concerning perforated lath in respect of National and Baker and the court at Tr. 2897-8 reserved its ruling with respect to National, Texas and Celotex. With respect to the others the exhibit was received subject to the usual reservation with respect to declarations of alleged co-conspirators. The objections are overruled and the exhibit received as against National, Baker, Texas and Celotex.

Tr. 2898-9. Exhibit U. S. 335 (a memorandum from Henley of Certain-teed to Baumhoger of Certain-teed concerning perforated gypsum lath). The exhibit was offered in evidence at Tr. 2898 (except for the ink or penciled longhand memorandum at the bottom of the page of the exhibit): Mr. Bromley for all defendants made the "usual" objection. The court reserved ruling with respect to National, Celotex and Texas, otherwise received the exhibit in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators. At Tr. 2899 in response to a question by Mr. Finck the court made clear that it was reserving decision on his continuing objection to this class of evidence pertaining to perforated lath so far as the three companies, National, Celotex and Texas, were concerned. The exhibit is received in evidence as against National, Celotex and Texas and the objection is overruled.

### 3. Testimony of Orin F. Perry, Jr.—resale prices of wholesale distributors (other than manufacturing distributors) of gypsum products.

At Tr. 2916-30 there is testimony of the witness Orin F. Perry, Jr., concerning resale prices of plaster, board

and the like by Orin F. Perry & Son, Inc., as a wholesaler—not as a manufacturing distributor. At Tr. 2920 there is an objection by Mr. Bromley on the ground that there is no charge in the complaint that affects the resale prices of wholesale distributors. At Tr. 2925 the court indicated that the testimony would be taken subject to the right of the defendants to move to strike in accordance with a later ruling if such a motion was then proper. At Tr. 2927 Mr. Bromley again objected on the ground that the testimony was immaterial because of an absence of any charge in the complaint covering resale price fixing as to board, and the objection was overruled subject to the right to move to strike the testimony on final argument on this question of the extent to which the complaint permits proof of this type of alleged violation of the Sherman Act. At Tr. 2928 an objection was recorded by Mr. Bromley for all of the defendants to this and to subsequent questions and testimony on this subject, the resale price of plaster 2972 ter and board by a wholesaler, and the court allowed an objection to be recorded applicable to plaster, board or miscellaneous products, on the ground that as to the defendants other than Certain-teed it did not bind anyone but Certain-teed, and the court indicated that there would be a ruling on this class of testimony when all of the reserved rulings were finally disposed of. The motion to strike this testimony is granted.

#### 4. Testimony of C. A. Higgins concerning perforated board made under National's own patent.

At Tr. 3037-39, inclusive, there is testimony by the witness C. A. Higgins in respect to perforated board made under National's own patent. At Tr. 3039 there was a motion to strike by Mr. Bromley upon the ground that the testimony was immaterial, there being no charge in the complaint that the defendants conspired with National to fix a price on board manufactured under National's own patent. At Tr. 3041 the ruling on this motion to strike was reserved. The motion to strike the testimony of this witness on this subject is denied.

#### 5. Questions and answers and exhibits referred to in list presented by Mr. Finck in behalf of National.

Tr. 2564. Exhibit U. S. 308 (a letter from Henning of U. S. G. to Black of American concerning metallized board)—see page 3 of Mr. Finck's list. This exhibit was received in evidence at Tr. 2564 subject to the usual

2973 reservation with respect to declarations of alleged co-conspirators and is covered by the continuing objection of Mr. Finck for National and Baker made at Tr. 2512 and recorded at Tr. 2517. The continuing objection is overruled with respect to this exhibit.

The continuing objection of Mr. Finck for National and Baker to the receipt of evidence including exhibits relating to metallized board and perforated lath, on the following pages of the record is overruled:

- Tr. 930—Metallized board license
- Tr. 932—Perforated lath agreements
- Tr. 938—Perforated price bulletins
- Tr. 1828—Lines 24, 25
- Tr. 1829—Lines 1 and 2, 7 through 25
- Tr. 1831—Lines 14 through 16
- Tr. 1835—Exhibit 208
- Tr. 2206—Lines 12 through 25
- Tr. 2207—Lines 1 through 5
- Tr. 2212—Exhibits 244, 245, 246
- Tr. 2217—Lines 22 through 25
- Tr. 2218—Lines 1 through 9, 22 through 24
- Tr. 2224—Exhibits 247, 248
- Tr. 2227—Exhibits 249 through 253
- Tr. 2239—Exhibit 254
- 2974 Tr. 2239—Lines 23 through 25
- Tr. 2240—Lines 1 through 13
- Tr. 2241—Exhibits 255, 256
- Tr. 2274—Exhibits 258 through 266
- Tr. 2275—Lines 20 through 23
- Tr. 2276—Line 25
- Tr. 2277—Lines 1 through 4
- Tr. 2281—Lines 20 through 23
- Tr. 2282—Lines 4 through 8, 20 through 25
- Tr. 2283—Lines 1 through 8
- Tr. 2309—Exhibit 269
- Tr. 2406—Exhibit 287
- Tr. 2409—Lines 24, 25
- Tr. 2410—Lines 1 through 17
- Tr. 2411—Exhibit 288
- Tr. 2412—Lines 2 through 25
- Tr. 2413—Line 1
- Tr. 2415—Exhibit 289
- Tr. 2416—Exhibit 290
- Tr. 2416—Lines 15 through 23
- Tr. 2418—Exhibit 291
- Tr. 2419—Lines 1 through 25

- 2975 Tr. 2420—Lines 1 through 25  
 Tr. 2421—Lines 1 through 25  
 Tr. 2422—Lines 1 through 17  
 Tr. 2425—Lines 14 through 22, 24, 25  
 Tr. 2426—Lines 1 through 8  
 Tr. 2437—Lines 14 through 25  
 Tr. 2438—Lines 1, 22 through 25  
 Tr. 2439—Lines 1 through 13  
 Tr. 2444—Exhibit 292  
 Tr. 2445—Lines 5 through 23  
 Tr. 2446—Exhibit 293  
 Tr. 2447—Exhibit 294  
 Tr. 2448—Exhibit 295  
 Tr. 2448—Lines 13 through 22  
 Tr. 2450—Lines 20 through 25  
 Tr. 2451—Lines 1 through 25  
 Tr. 2452—Lines 1 through 25  
 Tr. 2453—Lines 4 through 14, 19 through 25  
 Tr. 2454—Lines 1 through 5, 24, 25  
 Tr. 2455—Lines 1 through 25  
 Tr. 2456—Lines 1 through 11

The continuing objection of Mr. Finck for National and Baker to the receipt of evidence including exhibits relating to metallized board and perforated lath, on the following pages of the transcript (see page 3 of Mr. Finck's list) has been ruled upon in that portion of the court's rulings preceding this topic 5:

- Tr. 2653—Exhibit 313  
 Tr. 2660—Exhibits 314, 315  
 Tr. 3037 through 3041—Testimony by witness  
                   Charles A. Higgins  
 Tr. 2542—Exhibits 300, 300a  
 Tr. 2547—Exhibit 301  
 Tr. 2895—Exhibit 333  
 Tr. 2898—Exhibit 334  
 Tr. 2899—Exhibit 335

All testimony and exhibits which are in the nature of declarations of alleged co-conspirators and which under the foregoing rulings are allowed to remain in the record are received subject to the usual reservation with respect to the declarations of alleged co-conspirators, i. e., that they are binding upon co-conspirators only if a conspiracy is shown and the declarations be shown to be in furtherance or execution thereof.

(The documents marked as Government's Exhibits Nos. 241, 274, 275, 276, 277, 300, 300-A, 301, and 302, were



received in evidence.)

Justice STEPHENS. The Court will take a recess for 15 minutes.

(Whereupon, a 15-minute recess was taken, after which the trial was resumed as follows:)

2977 Justice STEPHENS. You may proceed, gentlemen.

Mr. STEFFEN. Your Honor, we at this time will offer, or reoffer, Government's Exhibits 239, 240, 271, 272 and 273, which are referred to in your Honor's opinion on page 14j as not having been offered.

I believe they are admissible on the same grounds stated by the Court.

Justice GARRETT. Why didn't you offer them with your offer of proof? Now we have to go and study those things all over again. They are excluded from our ruling here because they were not included in your offer of proof.

Mr. STEFFEN. I am very sorry, your Honor. I offered simply the five as being a simple way of getting before the Court the illustration that we would argue. If it is desirable, we can take this up tomorrow morning, but we would like to make the formal reoffer of those particular exhibits.

Justice STEPHENS. Well, the purpose of an offer of proof is to give the person offering a full opportunity to make a record on every item upon which he expects an adverse ruling.

I think if those exhibits are now offered, we will have to take a recess and look at them, because we assumed they were out of the case and we do not want to postpone any more rulings if it is possible to rule now.

Mr. STEFFEN. May I table my reoffer until tomorrow morning? I do not like to ask for a recess at this time because —

2978 Justice STEPHENS (interposing). The difficulty with that is that it is really an excessively difficult job for the Court, after adjournment at four o'clock, to pass upon the incidental questions of law that usually arrive every day, and also read from one hundred to two hundred pages of transcript. We don't have any time in the evening to look up and examine exhibits. I guess we will just have to face the necessity of doing it now.

Mr. BROMLEY. May it please the Court, the offer of these exhibits raises an entirely new question, and I should like to object to them on the ground that they are immaterial and irrelevant, for the reason which has not heretofore been stated, that they have no relation to any charge in the

complaint at all relating as they do to a possible closing of a manufacturing plant, if anything. I assumed the reason they weren't offered before was because they didn't bear on the same subject-matter as your Honors' ruling has concerned itself with, that is, the possible fixing of prices on purchased board.

This has to do with the subject-matter of whether there was an agreement that the plant would remain closed, the Certain-teed plant would remain closed; and I think that clearly is beyond any charges in the complaint, and I think clearly that is why the Government did not offer them in their offer of proof, because they knew they had something to do with an issue clearly outside of the pleadings.

So I would like the record to show now my objection to these offered exhibits on the additional ground that they are clearly immaterial to any charge in the complaint.

Mr. STEFFEN. Your Honor, we have not had—in the fifteen minutes' recess—an opportunity ourselves even to look the matters over. I would like to withdraw my offer at this time.

Justice STEPHENS. Very well; maybe you will find that it is not necessary to offer them.

Mr. STEFFEN. That is right.

Mr. FINCK. If the Court please, in making its ruling the Court is apparently of the opinion that National has a patent on its perforated board. It is my present information that National has no patent, and I would just like to call that to your attention. I will check that after recess today. I don't believe that I ever made that statement because I do not believe they have a separate patent; they simply manufacture perforated board in a different manner than USG does under its patent, and National has no license under that patent.

Justice STEPHENS. The Court was under the distinct impression, gained from the colloquies between counsel, I think, that National was manufacturing perforated board, not under a USG license but under its own patent. Of course it is not necessarily material, but nevertheless the fact ought to be shown, whatever the fact is, and if you can find out the fact and make it known to the Court, some correction may be made of that, if necessary.

2980 What is your understanding of that, Mr. Steffen?

Mr. STEFFEN. Our understanding is that they do not have a patent, but we don't know that as a fact. I think they made their board outside of the USG patent,

as they assumed.

Justice STEPHENS. Well, you may confirm that later, Mr. Finck, if you will, so that the record will be correct in that respect.

Mr. FINCK. Thank you.

Mr. STEFFEN. We have a little question which is bothersome with regard to witnesses, and I want to make a short statement to the Court.

I think at the time we adjourned it was rather assumed that Mr. Tomkins would be our first witness, and we so wrote Mr. Tomkins on January 28th, that we expected him here on the 7th of February, and he has come.

Following that, we got in touch with two other witnesses, making up the rest of our program, and found that Mr. Spease, for example, who is here, who is a necessary witness in the Government's case, has been ordered by his physician to take six weeks' time out, and accordingly the only way we could possibly get him in, as we saw it, was to put him on earlier.

We also have one other witness, Mr. Sensibar, who comes from Mexico, and we just happened to catch him here in the United States—and he also is a necessary witness.

2981 So that we now have arranged with Mr. DeWitt to have Mr. Tomkins to come on Thursday.

I want to say very clearly that we want to make every effort to cooperate with Mr. Tomkins for the reason that he is engaged, as I understand it, in war work, day by day, and has been for months. So we are endeavoring to make a firm engagement for Thursday. I don't know whether Mr. DeWitt would like to add anything to this statement of mine, or not.

Mr. DEWITT. I am Mr. DeWitt —

Justice STEPHENS (interposing). Yes, I know you are.

Mr. DEWITT (continuing).—and appear all too infrequently here.

Mr. Tomkins, I might say to the Court, is Chief of the Industrial Division of the New York Ordnance District. In that capacity he has charge of an office of some twelve hundred persons, who are engaged in making contracts for the production and delivery of ordnance material for the Army.

He is devoting, and has been devoting, ten or twelve hours a day ever since Pearl Harbor to that work. He has been asked from time to time to come down here, and every time he is asked to come down, it means that he

has to arrange appointments which are vitally important in Government work, so that he can arrange to come here, and he has thus kept aside, I think, perhaps ten or twelve different dates, resulting in very serious inconvenience and interference with his work.

2982 Now we were definitely notified that today would be the day for Mr. Tomkins to testify, because the Court was considering questions of the admissibility of evidence and there would be no other witness.

Accordingly, Mr. Tomkins made all of his plans to come here today and is here. Now he gets here, and he finds that there are other witnesses ahead of him. I need hardly say that this is not a matter of Mr. Tomkins' personal convenience at all, it is simply a question of his participation in the war effort. It is interference not with him personally, but with the war effort.

Now the Army takes this quite seriously, and I think has made its position known to the Government. We had hoped that Mr. Tomkins could be put on this morning. Mr. Steffen tells me that that is impossible, and now says that he can definitely undertake, subject to the Court's approval, to put Mr. Tomkins on the first thing Thursday morning.

Justice STEPHENS. Did Mr. Tomkins come down here this morning to testify, especially?

Mr. DEWITT. He did, your Honor, he is here and he has arranged his appointments accordingly.

It is true—I think I should say in fairness to Mr. Steffen—that after writing the letter of January 28 which I have here, and I think perhaps I should in fairness to Mr. Steffen read this letter which was written to my associate, Mr. O'Donnell, of the local bar—

2983 This is dated January 28, 1944.

"This is to confirm our understanding that Mr. Tomkins will appear as a witness when court convenes on February 7, 1944. We have another witness who, because of ill health, we must put on first, but we should reach Mr. Tomkins by the afternoon of the 7th. Will you please ask Mr. Tomkins to inform himself regarding plaster prices"—and so forth—I think the rest of it is clearly immaterial.

Now all I can do is to submit this question to the Court. If the Court wishes to satisfy itself as to the importance of Mr. Tomkins' work, that is easily done, as he is here.



I do think that it is a serious interference with important Government work.

Justice STEPHENS. Well, speaking for myself, subject to the views of my brothers, Mr. DeWitt, it would seem to me that Mr. Tomkins ought to be put on immediately if it weren't for the representations that there is a man here who is seriously ill.

How long will his testimony take, Mr. Steffen?

Mr. STEFFEN. His testimony should take certainly the rest of today.

I might say also that Mr. Tomkins' testimony will take about two days, and he told us, in conference with Mr. DeWitt, that he has made appointments in New York for tomorrow, and that it would probably be most convenient, all things considered, if we could put him on definitely Thursday morning. That will give him Thursday and Friday here.

Justice STEPHENS. Which is the gentleman who is ill?

Mr. STEFFEN. Mr. Spease.

Justice STEPHENS. Will you come forward where we can hear you?

Mr. SPEASE. Yes, sir.

Justice STEPHENS. What is your name, sir?

Mr. SPEASE. J. R. Spease.

Justice STEPHENS. Will it be seriously inimical to your health to postpone your testimony until day after tomorrow if Mr. Tomkins went on today?

Mr. SPEASE. Judge, I got up out of a sick bed to come here because I promised them I would, and I hardly know how to answer you. If I come out all right, it will be all right, but I am not able to stay here and I really felt that I should go home tonight, and with my promise uppermost in my mind, I got up and got a man who drove down here to be here this morning.

Justice STEPHENS. Where do you live?

Mr. SPEASE. In Fairmont, West Virginia.

Justice STEPHENS. How long a drive is that?

Mr. SPEASE. It should be ten hours, but we make it in about seven. We came across the ice and the snow, you know.

Justice STEPHENS. This problem of the convenience of witnesses of course is one largely—and the witnesses themselves ought to understand that—within the control of counsel. Subpoenas are issued as a matter of course, and postponements are, some of them, inevita-

ble, but in the large, the witnesses' time of coming is governed by the wishes of counsel in the case, because they know the order of their own testimony.

Since the matter has been presented to the Court, however, the Court will say that it seems to the Court that Mr. Tomkins' convenience has been unhappily interfered with. The Court does not say that as a matter of blame upon anyone, perhaps it was inevitable, and the convenience of war work has apparently been interfered with.

At the same time, the Court doesn't like to take the position—which is Mr. Tomkins—(Mr. Tomkins arose) of endangering this gentleman's health, and I assume you wouldn't want that done?

Mr. TOMKINS. No, indeed.

Justice STEPHENS. We think, therefore, that this witness ought to be put on now, and Mr. Tomkins should either be kept here to go on tomorrow morning or, if he prefers, return here Thursday.

Mr. TOMKINS. I would prefer to return Thursday if I could be assured of going on Thursday.

Mr. STEFFEN. We will make a firm engagement, as far as we have any power.

2986 Justice STEPHENS. The Court knows of nothing that would prevent your going on Thursday, Mr. Tomkins. There are, of course, some matters beyond the Court's control. For example, Judge Garrett, one of my colleagues here, has got to appear before the House Appropriations Committee sometime this week—

Justice GARRETT (interposing). That will require only about an hour.

Justice STEPHENS. That committee may meet some time without much notice.

Justice GARRETT. That will be short. But I would like to ask this. Will you have witnesses, then, on Tuesday and Wednesday, so that we can go on with this trial?

Mr. STEFFEN. We think so, yes.

Justice STEPHENS. Very well. The Court regrets the inconvenience to which you have been put, Mr. Tomkins, but it apparently has been inevitable and you may, if you wish then, return here Thursday at ten o'clock.

And you, Mr. Spease, may take the witness stand.

Mr. ADAMS. Before Mr. Spease takes the stand, I have something that I would like to call to the attention of the Court—I don't know whether Mr. Bromley has anything further to state.

Justice STEPHENS. Mr. Bromley, have you anything?

Mr. BROMLEY. May it please the Court, I should like the record to show, and the Court to understand, 2987 that it is our position that one result of the Court's announced rulings this morning is that the Government probably should be required to recall some or all of the witnesses concerned for further cross-examination, and I want to point out that in so far as the Court sustained rulings during the course of the direct-examination of these witnesses, which rulings now have been reversed, I did not cross-examine. Indeed, I may not have cross-examined broadly enough on reserved rulings, thinking that probably the situation would be taken care of by an offer of proof.

Therefore, I should like to say now that we, defendants' counsel, desire carefully to examine the record and testimony, and the exhibits which were the subjects of this morning's ruling, in order to see whether we think it necessary that there be further cross-examination as to those items, and if we determine that there should be, we think that the Government should be required to get these gentlemen back so that the cross-examination can be completed.

Justice STEPHENS. Mr. Adams?

Mr. ADAMS. I don't know whether I should bring up this particular point at this time. I do so only because of the statements which have been made by the Court with respect to not having any more deferred rulings, and allowing the record to get into the state in which it has been in the past.

2988 What I am about to say has nothing to do with the point Mr. Bromley just mentioned, although I agree with him in what he stated.

Justice STEPHENS. If it has nothing to do with Mr. Bromley's point, we will discuss his point first.

Mr. ADAMS. Very well.

Mr. STEFFEN. As I understand it, Mr. Bromley has simply requested leave to look over the record and he will make a formal request later on.

Justice STEPHENS. Yes. The Court takes notice of your statement on that subject, Mr. Bromley, and after you have examined the record, if you wish to make an application for the recall of witnesses, we will give you an opportunity to do so.

Now, Mr. Adams, what have you?

Mr. ADAMS. May it please the Court, at pages 2861 and 2862 of the transcript—and also referring to Exhibit 324 —

Justice STEPHENS (interposing). Exhibit 324 is the answer of the defendant Certain-teed Products Corporation to the Bill of Complaint in U. S. vs. Beaver Products, Equity 7907?

Mr. ADAMS. That is correct.

Justice STEPHENS. Now what is your point?

Mr. ADAMS. That was admitted in evidence as to the defendant Certain-teed, on the ground that it was an admission by Certain-teed. At the time that it was admitted in evidence I had, myself, never previously seen the exhibit, although I knew of its contents.

2989 After we recessed I had an opportunity to examine the exhibit and found that it is an answer which is not a verified answer. I have examined the law with respect to the question as to whether or not an unverified answer in an equity case in the Federal courts can be deemed to be an admission by the party on whose behalf the pleading is filed.

My examination of the law has convinced me that such a pleading cannot be construed as an admission against the party in a later and different lawsuit.

At page 2861, in the course of my objection—I noted an objection that it could only be deemed an admission for the purposes of that litigation and could not be regarded as an admission in any other litigation, except possibly between the same parties—but I did not have in mind at that time this point about it not being a verified pleading, because in the course of the argument, I had not personally examined the exhibit, and did not know what the fact was.

Now, I have not known exactly how to treat this, as a matter of presenting it to the Court. I should like formally to move to strike out that exhibit so far as it affects the defendant Certain-teed, and I have prepared here a little memorandum of law in which I have collected some of the leading cases on the subject. If the Court would like me to hand up that memorandum, I could do so, or I can, I think very briefly, give your Honor's the arguments  
2990 with respect to this point which are contained in the cases. The point seems to be well-established in all of the Federal courts, including the Supreme Court.

Justice STEPHENS. Well, you are entitled to present the authorities, if you wish to have the Court examine them.



If you are content with stating the cases and what they hold, you may do that and do it now, if you wish to.

Mr. ADAMS. From my point of view, I would like to do it in the most convenient way for the Court, and the briefest way, whichever your Honors feel would be desirable.

Justice STEPHENS. You may submit your brief on the matter. There is a witness here who is ill, and we think we ought not to delay the proceedings, so if it is going to take any length of time, submit your brief, giving copies to adverse counsel, and after this witness has been examined and cross-examined, you may re-raise the point.

Mr. ADAMS. Thank you, your Honor.

Justice STEPHENS. You may call the witness.

Mr. KNUFF. J. R. Spease.

Whereupon, J. R. SPEASE, a witness, called for and on behalf of the United States, having been first duly sworn, was examined and testified as follows:

2991 DIRECT EXAMINATION by Mr. KNUFF.

Q. State your full name, please, for the record.

A. J. R. Spease.

Q. Where do you live, Mr. Spease?

A. Fairmont, West Virginia.

Q. Are you connected with the Fairmont Wall Plaster Company?

A. Yes, sir.

Q. How long have you been so connected with that company?

A. Nearly forty-four years.

Q. In what business is the Fairmont Wall Plaster Company engaged?

A. We are jobbers of plaster, or were jobbers of plaster, and board, doing a building supply business, manufacturing cinder blocks, and so forth, with two stores.

Q. And how long have you been engaged as a jobber of plaster and the other things that you mentioned?

A. Since about 1902.

Q. Where do you sell your materials?

A. We sell our material largely in five different States, Virginia, West Virginia, Pennsylvania, Maryland, and we have, in years gone by, done a good deal of business here in the District.

Q. You say that you are a jobber of plaster. Will you undertake to explain to the Court what you mean by that term?

2992

A. Well, I mean as a jobber that we buy material from the manufacturer, or did, at a discount that enabled us to call on the dealer trade, and we had several different men on the road who saw people at frequent intervals, and performed the same function, I would say, that a manufacturer could do, that is, through our sales organization, but we did a better job because we saw our people often, and we had more men, and a manufacturer largely relies on broadcasts, I believe he calls them, or broadsides—they can't see their trade as often as we do, and we thought we had a pretty good arrangement for calling on the trade.

Q. How long have you been jobbers of plaster?

A. Since 1902.

Q. And specifically name some of the other materials that you act as jobber for.

Justice STEPHENS. Before you do that, let me ask a preliminary question.

Do you buy your material outright from the manufacturer, or take it on consignment?

The WITNESS. We buy everything we handle outright, and carry the account—I neglected to state that.

By Mr. KNUFF.

Q. First, before you answer the question that I asked you, as to what material you job, I want to ask you this question—are you still a jobber of plaster?

2993 A. No, sir, we are not.

Q. Since when haven't you been a jobber of plaster?

A. Since 1933, March 31st, the last car of plaster that American Gypsum had for us they held for ten days, it was 20 tons, to be shipped to Silas McQuain, at Elkins, West Virginia.

Q. What materials do you job?

A. We job roofing, insulation board, sand, lime, brick, and nearly every commodity that you would find around a building supply organization.

Q. Mr. Spease, were you a stockholder in the American Gypsum Company?

A. Yes, sir.

Q. Did you know Mr. Arthur Black?

A. Yes, sir.

Q. Were you related to Mr. Arthur Black in any way?

A. Yes, sir, he was my brother-in-law. I have been a widower for thirty-six years.

Q. That is, you were married to Arthur Black's sister?

A. Yes, sir.

Q. Was Arthur Black a stockholder in the Fairmont Wall Plaster Company?

A. Yes, sir, at the death of his father he had his stock, or part of it.

Q. Is he a stockholder today?

2994 A. Yes, sir.

Q. Is he on the board of directors?

A. Yes, sir.

Q. How long were you a stockholder of the American Gypsum Company?

A. From the time it was organized until they were sold out or taken over by Celotex.

Q. And that was in 1939?

A. Yes, sir, I think it was.

Q. From whom did you buy your plaster and your plasterboard?

A. We bought from American Gypsum Company for a number of years, until it was to our advantage to spread out a little, and then I bought a little stock in the Universal Gypsum Company when it was formed, and we had an arrangement with them.

Q. What did you buy from the American Gypsum Company?

A. Plaster and board.

Q. When did you start buying that plaster and board from the American?

A. When they were organized, in 1902, I think it was.

Q. And how long did you buy board from American?

A. We bought board up to 1930; I believe.

Q. Since 1930, did you buy board from American Gypsum Company as a jobber?

2995 A. No, sir.

Q. Did you have any conversation with Mr. Arthur Black on or about that time, concerning your purchase of gypsum board?

Mr. BROMLEY. I object to that, on the ground that it is incompetent and immaterial, and not binding on the defendants.

Justice STEPHENS. State whether or not you had a conversation with him, without answering as to what it was.

The WITNESS. Yes, I did.

By Mr. KNUFF.

Q. What did you have that conversation about?

Mr. BROMLEY. The same objection.

Justice STEPHENS. Did your question include naming the topic of the conversation?

Mr. KNUFF. I asked him if he had any conversation with Mr. Black concerning the purchase of gypsum board.

Justice JACKSON. That is not W. T. Black, that is Arthur Black?

Mr. KNUFF. That is Arthur Black.

The WITNESS. W. T. Black was his brother, and was with me for a number of years down there.

Mr. KNUFF. The question I have in mind does not pertain to this exhibit that your Honors are apparently looking at.

Justice STEPHENS. No, we haven't been examining the exhibit. I just happened to catch the name W. T. Black. Arthur Black was the Mr. Black who has been mentioned previously?

2996 Mr. KNUFF. That is right, the sales manager for American.

Justice STEPHENS. I am not sure the Court understands the force of your objection, Mr. Bromley. This apparently is directed to the charge in the complaint which has to do with the elimination of jobbers.

Mr. KNUFF. That is right.

Mr. BROMLEY. Well, a conversation with Mr. Black would certainly not be binding on any defendant in this case.

Justice STEPHENS. Mr. Black was with American, and Celotex took over the stock and assets of American.

Mr. KNUFF. Correct, your Honor.

Justice STEPHENS. Of course we can't tell what the conversation is until we hear it, but we don't quite see why it would not be admissible like other testimony, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. BROMLEY. That is my objection.

Justice STEPHENS. Very well, the objection is overruled. The testimony will be received, subject to the usual reservation with respect to declarations of alleged co-conspirators, and of course subject to our hearing the testimony. We can't tell until we hear it whether it is really material.

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. Very well.



By Mr. KNUFF.

2997 Q. Mr. Spease, did you have any conversation with Mr. Arthur Black of the American Gypsum Company, concerning the purchase of gypsum board at a jobber's discount?

Mr. BROMLEY. The same objection.

Justice STEPHENS. Overruled, subject to the usual reservation with respect to declarations of alleged co-conspirators.

The WITNESS. Yes, sir, I did.

Mr. KNUFF. When was the last conversation you had with him?

Mr. BROMLEY. May I have a continuing objection?

Justice STEPHENS. Yes, you may, and it is overruled, subject to the usual reservation with respect to declarations of alleged co-conspirators.

By Mr. KNUFF.

Q. When did you have the last conversation with Mr. Black?

A. The last one-sided conversation I had with him was on March 31, 1933, the day he refused to ship our last car of plaster.

Mr. BROMLEY. I move that that part of the answer beginning, "the day he refused", be stricken out as a conclusion.

Justice STEPHENS. It may go out as a conclusion. Just state what the conversation was, and let us conclude ourselves whether or not it was a refusal.

By Mr. KNUFF.

2998 Q. Mr. Spease, please pay attention to the question I am asking you.

Justice STEPHENS. Perhaps I had better explain to the witness, he may not be used to the formality of court proceedings, and they are really not just formalities, Mr. Spease.

This is a very large and complicated case, and even in shorter cases it is very necessary that we confine the testimony exactly to the issues in the case. The only way we can do that is by having counsel ask questions which are directly relevant to the issues, and confining the answers to the particular questions asked. Otherwise, the witness, in entire good faith, may go into subjects which are not really relevant to the case.

We do not mean by that, that you need feel constrained or ill at ease, or that you are required to answer questions that you cannot fairly answer. If you don't feel that you can answer a question, you may say so, or if you can't answer a question "yes" or "no", you may say so. But so far as possible, just listen to the question and answer that question only.

By Mr. KNUFF.

Q. I am talking about plasterboard. Did you have any conversation with Mr. Black concerning your purchase of gypsum board, and when was the last conversation that you had with him concerning that?

A. In 1930; I think.

2999 Q. In 1930?

A. Yes.

Q. Now will you just relate —

Justice STEPHENS (interposing). Fix the place of the conversation.

By Mr. KNUFF.

Q. Where did that conversation take place?

A. We talked it over so many times, I am sure that in 1930 it was on one of my trips to Port Clinton to see him.

Q. And it occurred at Port Clinton?

A. Yes, sir.

Q. Can you fix the time a little bit more definitely than in 1930; was it in the spring or the summer or the fall or the winter?

A. I don't believe I could just give you the date. I have it, we have a record in the office.

Q. It was, however, in Port Clinton?

A. Yes, sir.

Q. Where in Port Clinton?

A. At the American Gypsum Company's office.

Q. And what was the conversation that you had with him?

A. We had discussed it many times —

Q. (Interposing.) Discussed what many times?

A. That we would have to stop jobbing both board and plaster.

3000 Mr. BROMLEY. I move that that be stricken as a conclusion.

Mr. KNUFF. I don't believe it is a conclusion, he is stating what the conversation was.

Mr. BROMLEY. He is summarizing the effect of it.

Justice STEPHENS. Well, he is summarizing the effect of

previous conversations, Mr. Knuff. I think that may go out. Ask him to state what took place at this conversation.

By Mr. KNUFF.

Q. In this particular conversation that you had in Port Clinton in 1930, can you tell us what you said to Mr. Arthur Black and what Arthur Black said to you?

Justice STEPHENS. Of course we don't wish to lay an impossibility upon the witness. Sometimes conversations are short and are had on the theory that both parties are discussing a previous subject. If that is true here, you can ask the witness about the previous conversations, but if you do that, you must fix the time and place of those as well as you can.

If you can tell what this conversation was without reference to the others, please do that, Mr. Spease. If you cannot, then you can tell what was stated in these other conversations, fixing first, if you will, please, the approximate time and place of them.

The WITNESS. In 1930, after many conversations, he told me that he could not sell us any more plaster-board at a discount, to sell to the dealers, and that he would have to stop it, and that he would not ship any more, but with that he did ship 70-some cars of plaster and board, on which we were promised that they would take care of us some way. They were afraid of the U. S. Gypsum Company and Mr. Avery, and they didn't know how to work it out, and they were going to take care of it, but we never got a cent of commission.

Mr. BROMLEY. This is obviously not a conversation, he is reciting what he feels.

Mr. KNUFF. No, he isn't, he is reciting what Mr. Black told him.

Justice STEPHENS. Read the witness' answer.

(Thereupon, the last answer of the witness was read by the reporter.)

Justice STEPHENS. The part beginning, "but with that he did ship 70-some cars" is a statement of what happened, and not what was said.

Mr. KNUFF. It is what was said; I know, and I will bring that out.

Justice STEPHENS. It may go out as presently appearing. You may bring it out as part of the conversation, if you can.

By Mr. KNUFF.

Q. Did he tell you why he wouldn't sell you any more plasterboard?

3002 A. Yes, he was not permitted to, that he would like to —

Q. (Interposing.) Who wouldn't permit him?

Mr. BROMLEY. I object to that question —

The WITNESS (interposing). The United States Gypsum Company.

Mr. BROMLEY. Just a moment. I object to that question, that is not asking for a conversation.

Mr. KNUFF. I am asking for conversations, Mr. Spease.

Justice STEPHENS. Ask the witness if Mr. Black said who it was that would not permit him, in his conversation. Did he say who wouldn't permit him?

The WITNESS. Yes, United States Gypsum Company.

By Mr. KNUFF.

Q. Give us the words of that conversation, or if you can't give us the exact words, give us the substance of it, please.

A. He said that all jobbers of board and plaster had been eliminated, and that we would have to go, and he was not permitted to sell us any more for resale to dealers. That was in 1930.

Q. Did he say who wouldn't permit him?

A. United States Gypsum Company, they controlled the situation and it was common gossip among us all —

Mr. BROMLEY (interposing). I move that that be stricken, after the words "United States Gypsum Company".

3003 Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Mr. Spease, did he say who wouldn't permit him to sell you plasterboard?

Justice STEPHENS. He has already answered that. He has stated that it was United States Gypsum Company.

By Mr. KNUFF.

Q. Is that all that was said at that time?

A. Every time we discussed it, it was coupled up with Mr. Avery and the U. S. Gypsum Company.

Q. I am only asking you about this last conversation that you had with Mr. Black in 1930. Now at that time, when he said he couldn't sell you any more gypsum board, and he told you why, is that all he told you at that time?



A. No, it is not.

Q. What else did he tell you?

A. That he would continue to ship it for a while, and would make it up to us, pay us a commission.

Q. He did say that he would continue to ship gypsum board to you?

A. Yes, sir, and did.

Q. And that in some way he would find a means of making it up to you?

A. Yes, sir.

Q. And did he continue to send you gypsum board?

A. Yes, sir.

3004 Q. When did they stop shipping gypsum board to you?

A. I believe it was in 1933. They sold us board, understand, at the dealer's price, but not so we could resell it to dealers as we had been doing for years.

Q. Now during that interval between 1930 and 1933, did you purchase plaster from the American Gypsum Company as a jobber?

A. Yes, sir.

Q. And you also purchased board, is that correct?

A. That is correct.

Q. Now, at what price did you purchase the board?

A. We purchased the board at the regular dealer's price, less our discount; it has always been figured that way, whatever the price of board was to any dealer, we bought it at that, and then there was so much discount on each car, depending on the kind and size.

Q. By "discount", do you mean a jobber's discount, or a cash discount, which?

A. I mean a jobber's discount. We paid our bills each month.

Q. I am talking about board, Mr. Spease. Did you buy board between 1930 and 1933 at a jobber's discount?

A. No, sir.

Q. And the discount that you referred to was the cash discount for the payment of the bills, is that correct, in so far as board is concerned?

3005 A. Yes, that is all we got.

Q. Now between 1930 and 1933, did you purchase plaster at a jobber's discount?

A. Yes, sir.

Q. And after 1933 were you able to buy plaster at a jobber's discount?

A. No, sir.

Q. Now, at that time, did Mr. Black tell you why he couldn't sell you plaster at a jobber's discount, in 1933?

Mr. OLIVER. Will you fix the time and place of that conversation in 1933?

The WITNESS. Yes, sir.

By Mr. KNUFF.

Q. Where did the conversation take place?

A. Arthur Black called me on the telephone at Fairmont, West Virginia. I was in Cleveland, Ohio, at the Cleveland Hotel. He located me there.

Q. Now you are talking about 1933?

A. Yes, sir.

Q. O. K.

A. Earl McWhorter was with me, a Fairmont man. Arthur Black said, "We can't ship you any more plaster." I said, "Well, I will see you", and I hung up, and we drove to Port Clinton.

3006 Q. From where?

A. From Cleveland, Ohio.

When I got down there and went in to see him, he said, "We can't ship you any more plaster or board, or anything for resale". I said, "Why, what is all this about, what does it mean?" He just stared at me. He said, "I said we couldn't ship you."

After I asked about a dozen questions, and got no answers, I went in to their manager, Charlie Miller, and I said, "Charlie, Arthur tells me that you won't ship us any more plaster, board, or anything else at a discount. What does that mean? You have done it for twenty-nine years and we have stock in the company."

He said, "Didn't Arthur tell you?" I said, "I am asking you." I couldn't get a word out of either one of them other than, "We have quit."

Q. And that was when?

A. March 31, 1933.

Q. March 31, 1933?

A. Yes, sir.

Justice STEPHENS. The Court will take a recess until five minutes to two.

(Thereupon, at 12:20 o'clock p.m., a recess was taken until 1:55 o'clock p.m., of the same day.)

(The trial was resumed at 1:55 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, J. R. SPEASE, the witness on the stand at the time of recess, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

Q. Mr. Spease, just before the luncheon recess, you were telling us about a conversation that you had with Arthur Black in 1930. Did you have any conversation with Mr. Black prior to that in 1930, prior to the one that you have already told us about?

A. Yes, sir, I had a good many of them.

Q. Concerning what?

A. Our jobbing of plasterboard and plaster.

Q. And when did those conversations take place?

A. Practically every time we met, and I went up to see him frequently, and I would meet him once in a while in Pittsburgh—any time I would run into him.

Q. During what years?

A. Well, it was from 1930 to 1933.

Q. From '30 to '33?

3008 A. Yes, sir.

Q. Can you give us the details or the substance of any previous conversations, other than the one that you have told us about this morning?

Mr. BROMLEY. That calls for a yes or no answer, I assume, if the Court please.

Justice STEPHENS. Just answer that yes or no.

Mr. KNUFF. I have asked him for the details.

Justice STEPHENS. You asked him whether he could give any details.

By Mr. KNUFF.

Q. Can you?

A. State the question.

(The question was read by the reporter.)

The WITNESS: Yes.

By Mr. KNUFF.

Q. Will you tell us either the exact conversation or, if you can not give us the exact conversation, the substance of any conversations that you had with Mr. Arthur Black?

Mr. BROMLEY. I make the same objection on the ground that it is not binding on any defendant in this case, and also it seems to me that the witness ought to specify the time and the place before he starts.

Justice STEPHENS. Can you fix the time and place a little more definitely than you have, Mr. Spease?

3009 The WITNESS. Your Honor, if I had my records, yes. No, sir, not from memory, because when I would meet him I would say something to him, and then I wouldn't see him again —

Justice STEPHENS (interposing). You do have at your office a record of those conversations, or something that would refresh your recollection?

The WITNESS. Yes, I would have a record as to the dates that I would meet him someplace, just like the time at Cleveland.

Justice STEPHENS. Is there anything in this series of exhibits here before us which might help to refresh this witness' recollection?

Mr. KNUFF. There is not, Your Honor.

Justice STEPHENS. We think, Mr. Knuff, that since it is within the power of the Government to fix the date of these conversations approximately —

Mr. KNUFF (interposing). He has fixed them, if your Honor please —

Justice STEPHENS (interposing). The witness states that he can fix each one of them by his records. That ought to be done. We don't see how we can properly reject the objection, because it is conventional practice to require the fixing of the time and place of a conversation, at least if it can be done.

3010 Mr. KNUFF. I didn't understand when I talked to Mr. Spease on two other occasions that he had anything that he could fix the dates of these conversations with. I didn't understand him to tell me that. Whether he means to say that he has notes on that now, I don't know.

Do you have any memoranda, Mr. Spease, that would refresh your recollection as to the dates when these conversations took place? .

The WITNESS. Nothing other than every time we met, that I could go back to some records and see where we met, and I knew we talked about it, for I never saw him that I didn't say something to him about it.

Mr. KNUFF. I think that answers Your Honor's question. He hasn't anything specifically in mind except that he could thumb through all of his records and might find a



letter some place that said he was talking to Arthur Black on a certain day.

Justice STEPHENS. For how long a period of years did this go on?

The WITNESS. I would say from about 1930 up to 1933, when they turned us down flat.

Justice JACKSON. Is Mr. Arthur Black alive?

The WITNESS. Yes.

Mr. KNUFF. He was a witness here, Your Honor.

Justice JACKSON. Oh, yes, I had forgotten about it.

Justice GARRETT. And no inquiry was made of  
3011 him with respect to these conversations with Mr. Spease?

Mr. KNUFF. No, sir, Your Honor, we did not. Mr. Black is now working for the Celotex Company.

Justice STEPHENS. Where did you see him, Mr. Spease, during that period?

The WITNESS. I met him at Pittsburgh and Port Clinton, Ohio, and two different times in Cleveland that I recall right now. I was trying to think of the name of the hotel that he stopped at. I went there twice to see him.

By Mr. KNUFF.

Q. Where, in Pittsburgh?

A. In Cleveland.

Q. The Hollanden?

A. No, it is about a block down from there. I know the name of it, but on the spur of the moment I can't recall it.

Q. Auditorium?

A. Well, I have stayed all night there several times.

Justice STEPHENS. Approximately how many conversations did you have with him over that period of 3 years, would you say, according to your best recollection?

The WITNESS. Six or eight.

Justice STEPHENS. We will overrule the objection. The testimony is received subject to the usual reservation with respect to declarations of alleged co-conspirators.

3012 By Mr. KNUFF.

Q. Do you understand the question, Mr. Spease—the previous conversations that you had with Mr. Arthur Black, other than the one you testified to. Will you please give us the conversation, or if you can't give us the conversation give us the substance of the conversation, and tell us the time that that conversation took place?

A. Every time I met him between 1930 and 1933, there was common gossip that we were going to have to stop, everybody knew it.

Mr. BROMLEY. I move to strike that out.

Justice STEPHENS. Don't state what was common gossip. Just tell what took place between you and Mr. Black in the way of conversation.

That may go out.

The WITNESS. I just would start to talk to him, and I couldn't get him to say anything.

Justice JACKSON. What was the substance of what you said to him?

The WITNESS. "What am I going to do down there; how am I going to be able to continue my trade? We send you in that some company has cut a price to one of our dealers, and you used to get right after him and there was something done. Now you can't do anything."

3013 To make a concrete example of that, there was a case in Washington where the Gypsum Company was behind, there was a scarcity of cars—

Mr. BROMLEY (interposing). That is not a part of any conversation, I take it, and I move to strike.

Justice STEPHENS. That may go out. Tell us what you said. We, of course, don't expect you to remember what you can't remember, you are human like the rest of us and can't remember all of this in your mind. If you don't remember all these conversations and their substance and effect, just tell us you don't remember them. But don't argue the matter and give examples, unless you told them to Mr. Black.

The WITNESS. Your Honor, all we talked about was our ability to job and distribute plaster and plasterboard, and I knew it was common talk, as I already—

Mr. BROMLEY (interposing). I object to this.

Justice STEPHENS. That may go out.

The WITNESS. I saw him at different intervals, and the only way I would be able to tell when I saw him would be to refer to—

Justice STEPHENS (interposing). What did he say?

The WITNESS. I got very little out of him. He got so he was afraid to say anything, and the last day he just stared at me.

Mr. BROMLEY. I move that that be stricken about his being afraid and from there on.

3014 Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. With reference to your ability to buy as a jobber, can't you tell us what you said to Mr. Black, or if you can't tell us the exact words, the substance?

Mr. BROMLEY. When is this?

By Mr. KNUFF.

Q. Prior to the conversation that you have heretofore related.

A. When we put our money in the American Gypsum Company and bought stock, in 1902, we had a gentleman's agreement that we could job their plaster east of the Ohio River—

Mr. BROMLEY (interposing). I move that that be stricken out as stating a conclusion.

Justice STEPHENS. Mr. Spease, when you see one of the lawyers get up, please stop, because each side has a right to make an objection.

Mr. BROMLEY. I move that that whole statement be stricken.

Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Do you recall the question I asked you?

Justice STEPHENS. Read the last question to the witness.

3015 (The question was read by the reporter.)

By Mr. KNUFF.

Q. Now can you do that?

Mr. BROMLEY. There are two conversations, one in 1930 and one in 1933.

Mr. KNUFF. He said he was talking to him 6 or 7 times between 1930 and 1933.

By Mr. KNUFF.

Q. I want all conversations that you had between 1930 and 1933, with Arthur Black, concerning your ability to sell as a jobber. You said you saw him in Cleveland on two different times. What did you talk about in Cleveland?

A. The same old thing, our jobbing of plaster and plasterboard.

Q. Won't you tell us what you said to him and what he said to you?

A. I said, "Arthur, what does it mean, what are you going to do?"

He said, "I can't do anything."

Q. When you said, "What are you going to do?", did you refer to what you meant by that?

A. Yes, sir, continue to sell us at a discount so that we could continue to call on the trade and the dealers that we had on our books, and sell the dealers we had on our books.

3016 Q. What did Arthur say to that?

A. Sometimes, towards the last, he didn't say anything, but just stared at me. At other times he would say, "I am doing the best I can, and I can't help it."

Q. Did he say why he couldn't help it?

A. The U. S. Gypsum Company, Mr. Avery, wanted to do away with the jobbers.

Q. Did he say that?

A. Yes, sir.

Q. Where did he say that, in Cleveland?

A. I can't be sure, but I would say every time I ever saw him, but maybe not.

Q. You say you had a conversation with him in Pittsburgh?

A. Yes, sir.

Q. Whereabouts in Pittsburgh, the William Penn Hotel?

A. No, I think it was —

Q. (interposing). The Fort Pitt?

A. No.

Q. The Pittsburgher?

A. (Interposing.) I think it was the Roosevelt Hotel.

Q. What was the conversation that you had at the Roosevelt Hotel?

A. Well, sir, I can't recall it in words, it was the same thing every time we met.

3017 Q. What was the substance of it?

A. Would they be able to continue to ship us plaster, pack plaster in our bags so we could continue to call on the dealer trade, plaster and board.

Q. What did he say?

A. Toward the last he continued to ship us 70 cars and didn't say much of anything other than he would work it out some way, which he never did.

Q. What did he say to you in Pittsburgh concerning the arrangement to job plaster?

Mr. BROMLEY. I move to strike out so much of the last answer as begins "which he never did", I think he said. That is no part of any conversation.



Justice STEPHENS. It may go out.

By Mr. KNUFF.

Q. Do you recall?

A. No, sir, the exact words I can't recall.

Q. What was the substance of it?

A. That we be permitted to buy plaster and board at a discount and sell to the dealers the same as we had done.

Q. And what did Arthur say to you?

A. "You know as well as I do that conditions have been changed, and we can't do it."

Q. Did he tell you why he couldn't do it?

A. No, sir, not each time.

3018 Q. Not each time?

A. Toward the last I couldn't get anything out of him at all.

Q. Now you have previously testified that you were purchasing board and lath from American in 1930. Previous to that time did National Gypsum Company solicit your business to act as your supplier of board and plaster?

A. Yes, sir, they did. They wrote us letters, called on us, and I went to Buffalo and called on Mr. Baker.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 345, the same being a letter of the National Gypsum Company dated September 20, 1927, addressed to W. T. Black, General Manager, and signed R. F. Burley, and attached to that letter is a letter dated September 8, 1927, addressed to W. T. Black, General Manager, and signed "Very truly yours, National Gypsum Company." Did you ever see those letters before, sir?

A. Yes, sir.

Q. Were they received in the Fairmont Wall Plaster Company?

A. Yes, sir.

Mr. OLIVER. If the Court please, may we see a copy of that exhibit?

Justice STEPHENS. Yes.

Mr. KNUFF. Copies were given to Mr. Johnston this morning.

3019 Mr. JOHNSTON. One set was given to me, and I gave it to Mr. Bromley.

Justice STEPHENS. Take your time and look at it, Mr. Oliver.

(Document examined by Mr. Oliver.)

Justice STEPHENS. Have you seen it, Mr. Oliver?

Mr. OLIVER. Yes, sir, thank you.

Mr. FINCK. I haven't seen it.

Mr. ADAMS. I should like to have a chance to see it.

Justice STEPHENS. Very well, look at it.

(Document examined by counsel.)

By Mr. KNUFF.

Q. Mr. Spease, I show you what has been marked for Identification as Government's Exhibit 346, the same being a letter on the stationery of the National Gypsum Company, dated October 12, 1927, addressed to W. T. Black, General Manager, and signed R. F. Burley. I wish you would look at that letter and look at the reverse side of it, and state whether or not that is a letter that the Fairmont Wall Plaster Company received from the National Gypsum Company, and whether the reverse side of that letter contains a copy of the reply that Fairmont wrote to National Gypsum Company?

Justice GARRETT. What date is that?

Mr. KNUFF. October 12, 1927. The reverse side, if Your Honor please, of that letter will appear as a separate sheet of paper in the exhibits that I have handed to you. The answer is dated October 14, 1927.

Justice STEPHENS. It might save time, if you are going to identify all of the items in this packet of photostats, for the Court's three copies to be loaned to defendants' counsel, for a recess of about 10 minutes to be taken, and let defendants read over all of them at once, and then we won't have to wait every time the witness is asked a question concerning them.

Mr. KNUFF. Any way the Court wishes is agreeable to me.

Justice STEPHENS. Are you going to offer all of them?

Mr. KNUFF. All of them, Your Honor.

Justice STEPHENS. Will that be any advantage to defendants' counsel, or do you think we would save time this way? Have you had a chance to see them before this at all?

Mr. ADAMS. No, we haven't had any opportunity. I think it would be helpful.

Justice JACKSON. If you read them all now, how are you going to keep them all in your mind?

Mr. FINCK. We can't.

Justice JACKSON. I think this is the best way to handle them.

By Mr. KNUFF.

Q. Was Government's Exhibit 346 received by the Fairmont Wall Plaster Company, and does the reverse side thereof contain a copy of the reply that the Fairmont Wall Plaster Company sent to National?

A. Yes, it does.

Q. Mr. Spease, I show you what has been marked for Identification as Government's Exhibits 347, 348, 349, 350, 351, 352, 353, 354, and 355—347 being a letter dated September 27, 1929, addressed to Mr. J. R. Spease and signed M. H. Baker; 348 being dated October 3, 1929, addressed to Mr. M. H. Baker and signed Fairmont Wall Plaster Company, President; 349 being a letter dated October 7, 1929, addressed to J. R. Spease, and signed M. H. Baker, President; 350 being a letter dated January 11, 1930, addressed to M. H. Baker, President, and signed Fairmont Wall Plaster Company, President; 351 being a letter dated January 22, 1930, addressed to Mr. J. R. Spease, and signed M. H. Baker; 352 being a letter dated April 3, 1930, addressed to J. R. Spease and signed M. H. Baker, President; 353 being a copy of a telegram addressed to M. H. Baker, dated 4/7/30, and signed J. R. Spease; 354 being a copy of a telegram dated 4/7/30 addressed to J. R. Spease, signed M. H. Baker; and 355 being a letter dated May 23, 1930, addressed to J. R. Spease, signed M. H. Baker, President.

3022 Will you look over that series of correspondence, and will you state that the correspondence that was addressed to you was received by you, and as to the other correspondence which indicates that you sent it, will you tell us whether or not that was sent by you to the persons that it was addressed to?

A. Yes, sir, they are all familiar.

Mr. KNUFF. I now offer in evidence Government's Exhibits 345 to 355, inclusive.

Mr. ADAMS. I haven't read them yet.

Justice STEPHENS. Finish reading them.

(Documents examined by counsel.)

Mr. BROMLEY. May it please the Court, the defendants make the usual objection to all of these exhibits, and particularly point out that in so far as that part of Exhibit 346 which consists of the reply, dated October 14, 1927, Exhibits 348, 350 and 353, being letters of Spease, are concerned, they can not possibly be said to be declarations of a co-conspirator under any theory. In the second place,

we make the general objection as to incompetency as to all letters on the ground that there has not been any identification of any of the letters sufficient to make them admissible.

Justice STEPHENS. What are those numbers that you object to as being the declarations of Fairmont itself?

3023 Mr. BROMLEY. Exhibit 346, that half of it, the reverse side of it, which is the reply dated October 14, 1927; Exhibit 348, Exhibit 350, and Exhibit 353.

Justice STEPHENS. We have a little question about identification.

What has this witness said about identifying these various letters?

Mr. KNUFF. He said that the letters were received and that the replies which were sent out were sent out by the Fairmont Wall Plaster Company.

Justice STEPHENS. Do you know that of your own knowledge?

The WITNESS. Yes, I am quite familiar with them.

Justice STEPHENS. We think, gentlemen, that while, looking at them alone, Exhibits 346, the reply, and 348, 350 and 353, being letters or the like purporting to be from Fairmont to National, couldn't be binding alone as the declarations of a co-conspirator because Fairmont is not so charged, it seems to us that subject to the usual reservation with respect to declarations of alleged co-conspirators, as far as National is concerned, as distinguished from Fairmont, the letters might be admissible, Mr. Bromley, all of them, as a group of letters which, when read as a whole, are connected with each other and which tend to prove that there was a change of policy on the part of National in respect of the sale of its products. This, 3024 taken together with the testimony of this witness as to what Mr. Arthur Black said that Mr. Avery had told him, might make them relevant.

We think, therefore, they should be received in evidence under the theory the Court has just stated. If they do tend to prove a declaration by National, they are received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 345 to 355, both inclusive, were received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, did you avail yourself of the invitation that Mr. Baker gave you on September 27, 1929, and visit him at his office in Buffalo?



A. Yes, sir, I did.

Q. Can you tell us when you went there? Look at your telegrams or letters, and so forth; to refresh your recollection, if you care to.

A. I sent him a telegram on April 7, 1930.

Q. And did you go to Buffalo?

A. I did.

Q. When?

A. It was the Thursday morning after the 7th of April, 1930.

3025 Q. Did anybody go along with you?

A. I went up on a sleeper by myself.

Q. Did you see Mr. Baker?

A. I did.

Q. Did you have any conversation with Mr. Baker concerning jobbing arrangements that could be effected between National and Fairmont, for the jobbing of wall-board and plaster?

A. Yes, sir, I did.

Q. Will you relate to the Court, please, that conversation?

A. Mr. Baker and I discussed several matters first, and I brought up the matter of them packing plaster in our bags and selling us the board at a jobber's price so we could continue to call on the trade. He laughed and said, "Spease, you know as much about it as I do. A very rules that we can't do it, and we can't do it. You might as well go home and forget it, you are going to have to do something else."

Q. Was that the only conversation you had with Mr. Baker?

A. That is the only one I recall.

Q. How long were you in Mr. Baker's office?

A. It was a very pleasant visit. I don't know, an hour and a half or two hours, maybe not quite that much.

3026 Q. Were you able to effect any arrangements for the purchase of plaster or lath —

A. (Interposing.) Not a thing.

Q. (Continuing.) —from Mr. Baker?

A. Not a thing.

Q. And did you go home?

A. Yes, sir, that night.

Q. Now at that time, or shortly before that time, or shortly after that time, were you buying lath and plaster from Universal?

A. Yes.

Q. Were you buying that at a jobber's discount?

A. We were, yes.

Q. Did you continue to buy lath and plaster from Universal?

A. Up until they shipped our bags back and quit.

Q. When did they ship your bags back?

A. I have that date.

Q. Can you give us the approximate time?

A. It just slipped my mind at the moment, but I have it here.

Q. Well, go ahead and refresh your recollection.

Do you have any memorandum, Mr. Spease, that will refresh your recollection as to when Universal ceased selling to you, at a jobber's discount, plaster and board?

3027 A. Yes, sir, we have a telegram in the office, and I have a copy of it, and they shipped our bags back and said nothing.

Q. Do you know what the date of that was?

A. I can't state.

Q. Was it before you went up to Buffalo to see Mr. Baker, or after you went up to Buffalo?

A. It must have been before.

Q. How long before, was it in the same year?

A. Just a short time.

Q. And did they ever give you any explanation as to why, did Universal ever give you any explanation as to why they wouldn't sell you plaster or board?

A. Never a word, just shipped them back.

Q. Did you owe them any money at the time?

A. No, sir, we discount all our bills —

Q. (Interposing.) Always discounted your bills with them?

A. Yes, sir.

Q. Do you know of any reason why they shipped your bags back?

A. The only reason was that they couldn't ship us as a jobber any more and allow us a discount that we could sell to dealers.

Mr. BROMLEY. If this is not a conversation, I object to it as incompetent.

3028 Mr. KNUFF. I asked him if he knows any reason.

Mr. BROMLEY. Now he is giving a reason. That is his reason, I take it, nobody else's reason, and I object to it as incompetent.

Justice STEPHENS. Is this your opinion as to why they stopped?

The WITNESS. No, sir, I was told so.

Justice STEPHENS. By whom?

The WITNESS. Nobody in their company, but to practically everybody in the business it was common knowledge.

Justice STEPHENS. That may go out.

By Mr. KNUFF.

Q. Do you know Mr. Emil Hansen?

A. I do.

Q. With what company was he formerly connected in the gypsum industry?

A. The Oakfield Gypsum Company.

Q. Did you ever endeavor to buy plaster and board from Mr. Hansen, in 1933?

A. Yes, sir.

Q. Did you ever have a conversation with him at that time?

A. Yes, sir.

Q. Where?

3029 A. In Buffalo, New York.

Q. And what was that conversation?

Mr. BROMLEY. Just a moment. I object to that on the ground that it is immaterial and irrelevant, and this is more than the usual objection because there is no charge here that Mr. Hansen or the Oakfield Gypsum Company are co-conspirators, and therefore under no theory could any statement or declaration by them be binding at any time upon the defendants in this case.

Mr. KNUFF. If Your Honors please, if you will look at paragraph 45 (e), "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Justice JACKSON. Was Oakfield a manufacturing distributor?

Mr. KNUFF. Oakfield was a manufacturing distributor.

Justice STEPHENS. What do you say to that, Mr. Bromley?

Mr. BROMLEY. The charge is that these defendants concertedly induced and coerced the manufacturing distributors to resell, at fixed prices, gypsum board purchased from said companies.

Justice STEPHENS. Do you intend to prove, Mr. Knuff, that this Oakfield Company was acting at the instance of or under the coercion of a defendant?

3030 Mr. KNUFF. Definitely.

Justice STEPHENS. Anything further, Mr. Bromley?

Mr. BROMLEY. I object to it also on the ground it is incompetent because hearsay. I still do not understand this to be a charge that the manufacturing distributors were co-conspirators, so that their declarations can be said to be binding upon the defendants in this action.

Justice STEPHENS. Well, that objection raises a new point, Mr. Knuff.

We think, my colleagues and myself, that you are entitled to prove that there was, under paragraph 45 (e) of the complaint,—you are entitled to try to prove that defendants did stop manufacturing distributors, or did induce them and coerce them to resell, at the prices raised and fixed by defendant companies, gypsum board purchased from said companies, and if you can show that you are entitled to do so. But now you are asking the witness to testify what someone else told him, apparently, and that someone else is not a co-conspirator and not charged as a co-conspirator.

Mr. KNUFF. We don't agree with Mr. Bromley's theory at all, that the Oakfield Gypsum Company wasn't a co-conspirator. We think that they were co-conspirators in this case, and when Oakfield Gypsum Company fell under the domination of USG and did what the United States

Gypsum told them to do, that that is proof positive 3031 that they were acting in an unlawful manner. It is our contention that in so far as a certain phase of this case is concerned, Oakfield was just as much of a co-conspirator as United States Gypsum Company.

Justice STEPHENS. Do you charge that they were co-conspirators? You said that they concertedly induced and coerced the manufacturing distributors. Is that a charge? Is one who is coerced a conspirator?

Mr. KNUFF. We don't spell it out in so many words, but I think it naturally follows that when a person is coerced and he does an illegal act, that is no excuse at all.

Justice STEPHENS. That isn't the question. The question is whether he is the kind of a co-conspirator whose declarations would be binding.

Mr. KNUFF. If he is a co-conspirator, Your Honor, there are no degrees of co-conspirators.

Justice STEPHENS. I am afraid I don't make my trouble clear to you, Mr. Knuff. The declaration of a co-conspirator is binding, if it is shown that he is a co-conspirator and that the declaration was in furtherance of or in exe-



uction of the conspiracy, upon other co-conspirators. But that is upon the theory that he was himself a voluntary actor in the conspiracy, and being such, and the others being voluntary actors, they are bound by each other's conduct.

3032 But here your charge is, is it not, that the manufacturing distributors were coerced, they were compelled to do this? If they were compelled to do this, can they be classified as conspirators?

Mr. KNUFF. Definitely.

Justice STEPHENS. If I put a gun to your head and compel you to do something, can you be charged as a conspirator?

Mr. KNUFF. I think you are carrying the analogy a little too far —

Justice STEPHENS (interposing). I am putting it in those terms to test your position. I don't know what your position is, I am trying to find out.

Mr. KNUFF. My position is that whenever USG told Oakfield Gypsum Company that, "You can not sell to Fairmont", and they intimated that, "If you do sell to Fairmont Wall Plaster Company we will withdraw our permission from Kelley to sell you board", which they could do, that is a far different situation than putting a gun at your head. Here you had a situation where Oakfield was buying their board from the Kelley Plasterboard Company. USG says to Oakfield, "Don't you sell board to jobbers at a discount. If you do sell board to jobbers at a discount, we will withdraw our permission from Kelley Plasterboard Company to sell you board, and you will be left high and dry."

Justice GARRETT. And because they would be left high and dry, and acquiesced, that would make them a  
3033 conspirator?

Mr. KNUFF. That is one of the evidences of a conspirator, that is right; I think that alone would be enough, Your Honor.

Justice GARRETT. I was asking it in the form of a question, not making a statement.

Mr. KNUFF. I think it would. When they followed through and did what USG said, I think it would.

Justice STEPHENS. Well, we think that the Government is entitled to try to prove, under paragraph 45 (e) of the complaint, that the defendant companies did concertedly induce and coerce manufacturing distributors to resell, at prices raised and fixed by the companies themselves, gyp-

sum board purchased from those companies, and you may offer such proof as you have on that subject. Whether or not you can make the declaration of Oakfield binding upon the other defendants depends upon whether you can prove that it was a co-conspirator in a proper sense of that term.

Counsel apparently misunderstood the Court's illustration. That is the common illustration to differentiate between coercion, which is one of the terms used in the complaint, and voluntary action. I suppose we will have to receive this conversation subject to connection. The Government can't be compelled to put in all of its testimony at one time to prove this conversation. But we will accept it subject to connection, and if the Government can later prove that Oakfield is a co-conspirator in 3034 the sense that it did act in concert with the others, and the declaration is shown to be in execution and furtherance, then I suppose it would be binding upon the other conspirators.

Mr. BROMLEY. I merely want to point out that we had the conspiracy shown diagrammatically on the board the other day, and in connection with that diagram, at page 3190, Mr. Steffen said, "\* \* \* this first diagram here, showing USG, and A, B, C and D, is what we visualize as the group of defendants. If there is a conspiracy to be proven, they are the conspirators and that is the conspiracy."

My point is that it has never been charged that this man Hansen, or the Oakfield Company, was a conspirator, never before today. In fact, their position has always been that they were outside the conspiracy. It was drawn on the board, and illustrated by his argument, as to just what he meant by the conspiracy, and he put these people outside the circle. He didn't look at them then as co-conspirators.

Justice STEPHENS. We will take a recess for a few moments.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3035 Justice STEPHENS. Where in the complaint, Mr. Knuff, if anywhere, did you charge that the defendants conspired with anyone other than each other?

Mr. KNUFF. I don't believe that you can find that in the complaint.

Justice STEPHENS. I think not.

Well now, the Court has agreed as follows: The ques-

tions which the Presiding Judge has asked, and the tentative ruling made, were asked and made upon the theory that in the view of the majority of the Judges, the complaint was drawn broadly enough to include a charge, even though it was not made, in terms that the Oakfield Company was a co-conspirator.

But upon conference with my colleagues I find that they do not—and I agree with them—believe that the complaint is drawn broadly enough to include the Oakfield as a co-conspirator.

Now paragraph 45 (e) charges that the defendants—meaning the defendant companies who were charged as being defendants—“concertedly induced and coerced manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies.”

We think that the Government is entitled to prove that that happened, it is entitled to prove that the defendants did induce or coerce manufacturing distributors, whoever they were, “to resell, at the prices raised and fixed”

3036 by the defendant companies. But since we are agreed that the complaint does not charge Oakfield as having been a co-conspirator, a different question is presented with respect to its declarations, because the declarations are hearsay and can only come into evidence if they are shown to be declarations of a co-conspirator in furtherance of and in execution of a conspiracy, and if it is not charged as a co-conspirator, it cannot be proven to be a co-conspirator, and therefore its declarations are not admissible.

Therefore, the Court rules that the conversation with Mr. Hansen is not admissible. The Court does not rule that you cannot prove, by competent evidence, that Oakfield was induced and coerced by the defendants to resell at the prices fixed by them.

Mr. KNUFF. We are going to follow this by the testimony of Mr. Eldred, and Mr. Hansen, to the effect that they were told certain things by USG; and of course, like in all other conspiracy cases, we cannot put in our entire case just by one witness. We are going to connect this testimony up.

Justice STEPHENS. Well, that is very true, or that may be very true, Mr. Knuff, but as I tried to make clear, my original tentative ruling was on the theory that my colleagues' broad ruling this morning, to the effect that the complaint as drawn was not limited by the Bill of Particulars or the subsequent paragraph 54, was broad

3037 enough to permit the complaint to be construed as charging some persons to be co-conspirators not named as defendants.

But I find, in conference with my colleagues, that I misconstrued the breadth of their ruling on that; they do not think the complaint is that broad, and neither do I.

Therefore, we think the declaration of Mr. Hansen, the statement of Mr. Hansen, is not admissible, although you may call him to prove what he was told to do by USG or other defendant companies.

Mr. KNUFF. May we have this evidence taken at this time under the provisions of Rule 43 (c) of the Rules of Federal Procedure, and I particularly call the Court's attention to what appears at the top of page 57 in my book:

"The court may add such other or further statements as clearly show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury, the same procedure may be followed except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible upon any ground, or that the witness is privileged."

Justice STEPHENS. Where is that, again?

Mr. KNUFF. That is Rule 43 (c).

Justice STEPHENS. Let me read that.

3038 How much of this testimony will there be?

Mr. KNUFF. Possibly two or three more incidents.

Justice GARRETT. You mean with this witness?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. Are there any more exhibits in connection with such testimony?

Mr. KNUFF. Yes, your Honor.

Justice GARRETT. You mean additional exhibits?

Mr. KNUFF. Yes, your Honor.

Justice STEPHENS. They are in this file of exhibits, are they not?

Mr. KNUFF. Yes, your Honor.

May it please the Court, there is another theory under which this evidence is clearly admissible —

Justice STEPHENS (interposing). Before you go to that, let me ask you if I clearly understand why you are invoking Rule 43 (c), which says that in actions tried without a jury the same procedure may be followed, except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible upon any ground.



Now I suppose the reason you want to take it is because, in the event this case, after its conclusion should be decided against the Government, and you should take an appeal, you would attempt to convince the appellate court that the complaint is drawn broadly enough to charge Oakfield and others like Oakfield, as co-conspirators, and that therefore their declarations can come in, and that therefore the evidence ought to be allowed?

Mr. KNUFF. That is one reason, and another is because this witness is now ill, he is now going to Florida, we hope he is going to be alive for a great many years, but we don't know. We don't know what the ultimate outcome of this case will be. We would like to preserve this testimony.

Another reason is the fact that Mr. Hansen and Mr. Eldred will be called, and we will connect this up, but we would also like to have the testimony of this witness at this time.

I don't think that defendants can be prejudiced by it because the Court can always control that, and it is quite material to our case, as we see it, in view of the state of health of this witness, now.

Justice STEPHENS. You had another theory that you had in mind?

Mr. KNUFF. Another theory on which it is admissible is this, your Honor, that in proving coercion, it can be done in many ways.

The person who did the coercing could come into court and say, "Yes, I did that." The person that heard the coercion exerted, or the influence exerted, can say, "Yes, I overheard that conversation."

3040 Another way of proving coercion is to show the statements of the person coerced as showing the state of mind that he had.

Now that has been clearly ruled in the Nick and Weston case, as material.

In other words, the statements made by the person coerced are material, not for the purpose of showing the truth of that statement at all, but for the purpose of showing the state of mind of that person.

Justice STEPHENS. Well then, of course you get into the problem of the "spontaneous declaration and circumstantial utterance" rule.

Do you contend that Mr. Hansen's statements are so closely connected with the event of coercion, that they are in the nature of spontaneous declarations?

Mr. KNUFF. Well, I don't know how close the statement of Mr. Hansen was made after the coercion. I don't think that is material.

The material thing is, was he coerced, and we can show whether he was coerced by showing what he said as bearing upon his state of mind, not for the purpose of showing that it was true or false or anything else, but for the purpose of showing his state of mind. That was definitely raised in the Nick and Weston case out in St. Louis, and those statements were admitted.

Justice STEPHENS. Where is that case?

3041 Mr. KNUFF. The citation of the Nick and Weston case?

Justice STEPHENS. Yes.

Mr. KNUFF. Mr. Steffen participated in that case and he probably could give the Court the citation.

Mr. STEFFEN. I don't have the citation, it is in the Seventh Circuit.

Justice STEPHENS. Did it go to the Supreme Court of the United States?

Mr. STEFFEN. Certiorari was denied.

Justice STEPHENS. Have you the case in the Circuit Court of Appeals?

Mr. STEFFEN. I don't have it here. It was decided in 1941. I can get that for the Court.

Justice STEPHENS. That is an entirely new theory. We all think that this evidence is not admissible under the complaint as drawn, as the declaration of a co-conspirator, but in view of the health of this witness, and in view of Rule 43 (c), the Court is willing that you should make a record of the testimony as to that, so that in the event of an appeal, in which you wish to urge that the complaint is broad enough to permit it to come in as a declaration of a co-conspirator, it will be in the record.

So you may examine the witness on that.

In the meantime, if you wish to offer it upon this new theory which you have just spoken of, which we haven't discussed before, that it is admissible as a declaration

3042 tion showing the state of mind of the person alleged to have been coerced, you may present that case to us tomorrow morning.

I call your attention also to the case of Sanitary Grocery vs. Snead, in the United States Court of Appeals for the District of Columbia, which discusses the circumstantial utterance and spontaneous declaration rule.

Mr. KNUFF. My understanding is that we can take the testimony at this time?

Justice STEPHENS. The understanding is that at present the testimony is being taken under Rule 43 (c), but it is taken after a ruling that it is not admissible in evidence as the declaration of a co-conspirator, for the reason that the complaint does not charge the Oakfield Company with being a co-conspirator. But you are permitted to take the testimony in view of the witness' health, and under Rule 43 (c).

Mr. BROMLEY. May it please the Court, I take it then that it is not in the case, and that we do not have to assume the burden of cross-examination on it? Of course, having had no notice with respect to it, I am not prepared to cross-examine the witness on it, and couldn't possibly.

Justice STEPHENS. The only possibility of it being received is upon this additional theory: If the Government seriously insists upon the Court's considering its admissibility upon that theory, the Court is obliged, of course, to consider it, and the witness ought not to be released  
3048 before you cross-examine him if it should be received upon such a theory.

Can't you get that case, perhaps, in a few moments, and let us see it?

Mr. KNUFF. I think we can.

Justice STEPHENS. We will take a recess then. The library has all the Federal Reports in it and we will take an informal recess—we will remain here.

(Whereupon, an informal recess was taken, after which the trial was resumed.)

Justice STEPHENS. We have read this case, and we think we understand your contention. We will be glad to have you state anything further you wish to, Mr. Knuff.

Mr. KNUFF. Well, I can only say, your Honor, that what I have in mind appears particularly on page 671, and has the Court read what is said there?

Of course, this testimony is hearsay but it was admissible here for the purpose to which the evidence was expressly confined by the court. The court limited this character of evidence to the purpose of showing the state of mind of the committee representing the exhibitors as to why this payment of \$6,500 was necessary. This money was raised subsequently by the committee from the exhibitors and paid over to Weston. The gist of the unlawful act is extortion. Extortion involves a state of mind as an

3044 element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act. If the exhibitors had paid this money of their own initiative and voluntarily there would have been no violation of the Act. It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the committee acted. The purpose of this evidence, as repeatedly limited by the court, is not to prove what was said at the conference between Kaimann and appellants or that the situation thought to exist by Kaimann and other members of the committee really existed. It is to show the state of mind of Kaimann produced by the transaction and that his conclusion was communicated to other members of the committee. Whether Kaimann was justified in reaching such conclusion is an entirely different matter. Whether justified or not, that was the conclusion which he stated and which, undoubtedly, had its effect upon the minds and the future actions of the members of the committee in making this payment."

In other words, we have here a continuing conspiracy. At all times, Oakfield was under the compulsion to do what USG wanted them to do, because if they didn't do it, USG could immediately withdraw their consent from Kelley, and Kelley would not then be able to sell board to Oakfield.

3045 So we have here a continuous compulsion on the part of USG to impose their will upon the Oakfield Company; and state of mind, we say whether justified or not, is material in this case.

Justice STEPHENS. Well, we are of the view, as already stated, that since the complaint is not broadly enough drawn, or even broadly drawn as it is, isn't drawn in a manner which charges the Oakfield Company with being a co-conspirator, that the testimony cannot come in as the declaration of an alleged co-conspirator.

We do not deny to the Government the right to put the testimony on, under Rule 43 (c), but we construe that rule to be in the nature of, in a non-jury case, an offer of proof, which does not require cross-examination, because the first part of the rule, it will be noted, says:

"In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court



may require the offer to be made out of the hearing of the jury. The court may add such other or further statements as clearly show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury, the same procedure may be followed except that the court, upon request, shall take and report the evidence in full unless it clearly appears that the evidence is not admissible upon any ground, or that the witness is privileged."

3046 But we think that the taking of evidence under Rule 43(c) means that in substance it is taken as an offer of proof in order that the appellate court may be fully advised as to the nature of the evidence excluded.

3047 Therefore, counsel for the other side are not called upon to cross-examine, although they are not denied that right if they wish to. The evidence is excluded so far as that theory is concerned.

Now so far as the other theory is concerned, you are offering the statement of a man named Hansen who was an officer, we understand your contention to be, of Oakfield; as a declaration on his part.

Now unless it can come in as the declaration of a co-conspirator—and we have ruled that it cannot—it has to come in either as an exception to the hearsay rule, or as evidence to which the hearsay rule is not applicable.

The exception which you might possibly try to fit it under is represented by *Sanitary Grocery v. Snead*, 90 Fed. (2d) 374, where the United States Court of Appeals, in an opinion written by myself, discussed the spontaneous declaration theory where a statement is made in the very course of an act. That apparently is not the theory under which you are urging it. You are urging it under this case of *Nick v. United States*, 122 Fed. (2d) 660, at 671. That is a different theory.

That is the theory that where an act itself is of ambiguous character, the statements made by the actors may be introduced in evidence to characterize the act.

That is referred to in Wigmore's short book, *Wigmore—Code of Evidence*, Third Edition, 1942, under Rule 3048 171, and illustrations are there given.

Whether the evidence can come in under that theory, we can hardly rule on in advance of a showing as to when the alleged act of coercion occurred, and when the statements were made which tend to characterize it.

An act may or may not be one of a coerced character. It is conceivable that the declaration of the actor or the

party to the alleged coercion, or the person alleged to be the subject of the alleged coercion, might be admissible if made at the time or reasonably connected with the time pressure was being placed upon him, so that it characterized the act.

An illustration of that is given in Wigmore, where an issue of payment by P to J was involved.

"P handed money to J; P's words at the time of handing the money, 'this is the money I borrowed', are admissible, as indicating whether it is a loan or a payment or a deposit, because the act of handing the money is independently material in the case".

Where the act in issue is payment, and the act of handing is ambiguous because it might be payment or it might be further loan, a statement of the actor is admissible to characterize the ambiguous act.

Conceivably, this evidence is admissible, the statement by Mr. Hansen; if you also show that he was subject to coercion or subject to acts which you claim constitute coercion, but which might be otherwise construed, his statement might conceivably be admissible under that second theory as characterizing an ambiguous act.

We will have to hear the statement, since you seriously offer it under that theory, then, subject to a motion to strike it unless it is shown that it is so reasonably connected with an ambiguous act that it can remain in to characterize it. The ruling is made in that manner.

Of course it is to be understood that if, under that theory, it is admissible, you ought to cross-examine to protect yourself.

Mr. BROMLEY. I would like to know from counsel what the ambiguous act is that he thinks he is going to prove.

Mr. KNUFF. We are going to prove that there was coercion.

Justice STEPHENS. Yes, but you have offered this under a theory of law, that a declaration which would otherwise be out, as hearsay, can come in because it is not subject to the hearsay rule, because it is a characterization by an actor of an act which is itself in issue, and which is ambiguous; and it is, I think, a fair question, as to what you contend is the ambiguous act.

Mr. KNUFF. We have said that Oakfield Gypsum Company was under compulsion by USG, and that is what we are going to endeavor to connect up, to show what pressure USG put upon Oakfield.

3050 Justice STEPHENS. Yes, but you must bring yourself fairly within the rule upon which you rely, and there must be some specific act which this declaration is alleged to characterize.

Mr. KNUFF. It would be what USG told Oakfield. I don't know what they told Oakfield.

Justice STEPHENS. That is not an act, that is another utterance.

Mr. KNUFF. Well, of course it was your Honor that used the term "ambiguous act"; I didn't use the term, I used the term to show the state of mind of this man that there was coercion here within the Nick and Weston case.

Justice STEPHENS. Well, the Nick and Weston case, while perhaps the language of the judge there isn't as technically stated as the language that I have been using, Mr. Knuff, is clearly under the theory which I have been announcing, because there the charge was extortion, and there was a payment of money which is an act, and the question was whether or not it was a payment under coercion, or a voluntary payment. The testimony which was allowed in was the testimony that this was another "picnic", or words to that effect, and the very theory upon which you rely is the theory which Mr. Wigmore states, and to which I have been referring.

Mr. KNUFF. And here we are going to show that Oakfield Gypsum Company refused to sell these people board.

3051 Now did they refuse to sell them board because they were under compulsion? Did they refuse to sell them board because their credit was no good? Those are the things that we are going to show.

Justice STEPHENS. Well, that hasn't been stated before, Mr. Knuff.

I wish you would bear in mind that this is a friendly discussion of the law, and not a contest between Court and counsel.

Mr. KNUFF. I don't mean, because I raise my voice, that I think it is a contest. I just can't help myself, that is all, when I get enthused, I do raise that voice of mine.

Justice STEPHENS. Very well, our hearing is excellent, Mr. Knuff.

We rule that if the evidence can be brought within that theory, that it may be received. Whether it can be brought within that theory depends upon what you prove with respect to some act, not with respect to some statement.

You may proceed to examine the witness.

Mr. KNUFF. Shall we go ahead at this time?

Justice STEPHENS. It is ten minutes after four. I understood you to say that this witness could not stay here beyond tonight. Did I misunderstand you? I hope I did.

The WITNESS. I said I did not want to stay if I could get away. I really ought to get back home.

3052 Justice STEPHENS. The defendants have a right to cross-examine you, Mr. Spease, and that would prolong the hearing so long today that I think we will have to ask you to come back tomorrow morning.

Do you have hotel accommodations?

The WITNESS. Yes.

Justice STEPHENS. Before we adjourn, Mr. Adams presented this morning a memorandum of authorities with respect to Exhibit 324. The Government will wish to present a counter-memorandum, I assume.

How much time do you wish for that?

Mr. KNUFF. I don't think we have even looked at this memorandum as yet. We don't know what is in it. I wonder if we could tell you in the morning.

Justice STEPHENS. Yes, let us know in the morning. We wish to fix a definite time, and we wish to hold you to it, so we will have a definite knowledge when we are going to get this material.

We will now adjourn until tomorrow morning at ten o'clock.

(Thereupon, at 4:10 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 8, 1944.)

3053. IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.



SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
WASHINGTON, D. C., TUESDAY, FEBRUARY 8, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3057 Justice STEPHENS. With respect to the testimony which is now being offered, the Court cannot rule upon it without hearing it. We can't tell whether it is permissible within an exception to the hearsay rule without hearing it. So we'll hear it, subject to a motion to strike.

Mr. BROMLEY. Might I, with the Court's permission, make a short statement, in view of Your Honors' position, as to what it seems to me the rule should be and is?

Justice STEPHENS: We would be glad to have your help.

Mr. BROMLEY. I submit that before the rule admitting statements of an actor to characterize an ambiguous act, referred to by the presiding judge at the close of court yesterday, can be applied, the ambiguous act must be a competent, material fact in the case. Thus, in *Nick v. United States*, the payment of the alleged extortion money was an issue in the case, and the state of mind of the party making the payment was, of course, an element of the offense under the anti-racketeering act.

3058 Similarly, in the illustration given in Wigmore's short book on Evidence, the act of handing the money over was independently material in the case.

Here, the particular issue involved is whether or not the defendants conspired to restrain trade by coercing Oakfield to sell the board which Oakfield bought, at USG bulletin prices. That is the charge in the complaint. Oakfield, not being an alleged co-conspirator, what it did or said to some other and third person, likewise not an alleged co-conspirator, is not binding on any of the defendants.

The Court yesterday recognized this to be so in its ruling that declarations by Mr. Hansen, an officer of Oakfield, were not admissible or competent as evidence of the alleged conspiracy.

How can the Government attempt to prove the alleged conspiracy by what Oakfield did, any more than by what Oakfield said? The fact that Oakfield refused to sell Fair-

mont, if that be so, is not admissible against these defendants. I would like to repeat that; The fact that Oakfield refused to sell Fairmont, if that be so, is not admissible against these defendants. It is not binding on them as any proof of the conspiracy.

Therefore, since evidence of the act—that is, Oakfield's refusal to sell—is incompetent, Oakfield's state of  
 3059 mind is immaterial and incompetent. The rule, it seems to me, must be limited to statements of an actor to characterize an ambiguous act which is a material issue in the case, or which is done with respect to one of the parties in the case.

Since, in my view, Oakfield's refusal to sell is not a material issue, because there is no charge with respect to it, Oakfield's state of mind must be incompetent and immaterial.

Mr. STEFFEN. May I make an equally short statement, Your Honor?

Justice STEPHENS. Yes, the Court wishes to hear from the Government.

Mr. STEFFEN. As to the first point, that the state of mind must be material, we perfectly agree. I think it was brought out by Mr. Knuff yesterday that under 45 (e) the charge is that the defendants, by conspiracy, concertedly coerced and induced manufacturing distributors to refrain from sales except at bulletin prices. Now that is a charge that the defendants, by a conspiracy, coerced or induced Oakfield, in this case, because of course we will tie it up by showing that Oakfield was buying board from the Kelley Plasterboard people at that time, and that the Kelley Plasterboard Company was a member of the general conspiracy which we have charged here. So that there is no question but what it comes within the charge that the  
 3060 defendants conspired to coerce or force Oakfield, to whom they were selling board, to resell it at bulletin prices or, in this case, not to resell it to jobbers at a discount, because under the regulations they had to sell jobbers at the same price as they sold dealers.

That makes it clearly material what the state of mind of the Oakfield Gypsum Products Company was at the time they were dealing with Mr. Spease.

Now how are we going to establish that they were coerced, or that they were forced to sell at bulletin prices and to abide by bulletin terms? As Mr. Knuff said yesterday, there are various ways of proving coercion. One would be to have a statement made by the defendants,

"Yes, we will coerce Oakfield." Of course, we can't show you that statement, because it is very rarely that conspirators sit down and say what they are going to do. What we have to do is to establish, more or less by the actions of Oakfield, what they did and why they did it; and the state of mind of Oakfield is; we contend, a very material matter which can only be established by, as I said, direct statements or by how they acted in dealing with Spease or anyone else. And as circumstantial evidence of what they were doing we can introduce what they said, which is, of course, the issue here.

3061 We have the Nick and Weston case, which has been cited here, which was argued on the basis of the Hillmon case, which is the leading United States Supreme Court authority and has been followed in all Federal Courts since it was decided.

The Hillmon case, which is 145 U. S. 285, had to do with a suit on an insurance policy. Mrs. Hillmon claimed that her husband had died. The insurance company claimed that there was a conspiracy whereby somebody else had been produced as the corpse, and that in view of that fact the insurance was not payable.

They had found, I might say, out in the hills, a corpse. The question was whether it was Mr. Hillmon or someone else.

Now the evidence that was presented by the insurance company was a letter written by a man named Walters, saying, "I am going up into the hills." He wrote it to his sister, and they were not parties at all to the transaction. And the evidence was introduced to show that a man named Walters had an intention of going up into the hills, and that the corpse might have been Walters'. And that was introduced before a jury, upon which they could base an inference that the corpse may have been Walters' and not Hillmon's.

Following that there have been a large number of Federal cases saying that where it is material, as in this case, to show the state of mind or the intention or the purpose of a person, as for example, in this case, Mr. Han-  
3062 sen of the Oakfield Gypsum Products Company, then it is relevant and competent to show what they said, what their reactions were, as circumstantial evidence, not for the truth of the matter asserted, but as circumstantial evidence of why they acted.

And I may say, although it may be difficult to prove, I may say that throughout this industry each of these dis-

tributors has been in fear of business death if he violated any one of these instructions; and the best way we know of showing that fact, the fact of fear pervading the industry that if they didn't follow the rules they would be put out of business, is to simply introduce the assertion made, if it was made, by the Oakfield people at the time they were discontinuing selling to Spease.

The act is ambiguous, if you wish, because here is a man who comes in and says he would like to buy goods. His credit is all right and everything is all right, and they don't sell. Why don't they sell? We say that the state of mind of Oakfield, and, of course, of the representatives of Oakfield, is very material in determining whether they did it voluntarily or whether they were coerced as charged in the complaint.

Justice STEPHENS. Now you are not arguing, apparently, the theory which we were discussing yesterday, the introduction of a statement to explain an ambiguous act which itself is in issue. You are now arguing a 3060 different theory, a different exception to the hearsay rule, the admissibility of evidence to show a state of mind regardless of the ambiguity of the act to which it relates.

Mr. STEFFEN. I don't know whether that is different or not, Your Honor. I think it is a variation.

Justice STEPHENS. Mr. Wigmore says it is very different.

Mr. STEFFEN. I see.

Justice STEPHENS. He might be mistaken, of course.

Mr. STEFFEN. We would cite, in support of what I just said, Wigmore on Evidence, Third Edition, Section 1790 and also Section 1714, which seems to bear out or seems to approve of this line of reasoning.

Justice STEPHENS. They are the orthodox comments with respect to mental or physical condition.

The Court has been giving some consideration to this question itself during the recess, and, with the aid of Mr. Cantor, my assistant, has looked up some authorities.

We thought perhaps the Government was relying upon *Lawlor v. Loewe*, 235 U. S. 522, and upon such cases as *Magruder v. Montgomery*, 33 Appeals D. C. 133.

In *Lawlor v. Loewe*, the Circuit Court of Appeals for the Second Circuit held that evidence of a customer's statement that he had ceased to trade on account of threats by a union was improperly admitted because it could not tend to prove that the threats were made. The



3064 Supreme Court reversed, citing from Wigmore the section which has to do with proof of motive. And there have been some cases following that rule.

Other cases that seem pertinent, which counsel may wish to be advised about, are: Greater New York Live Poultry Chamber of Commerce v. United States, 47 Fed. (2d) 156; Johnston v. Yost Lumber Company, 117 Fed. (2d) 53.

In the case in this jurisdiction, assertions of motive for an investment were made to show reliance on a false representation alleged.

The Court thinks it had better hear this testimony. Is there much of this class of testimony in the case?

Mr. KNUFF. No, there is not, Your Honor. I don't think there is any after this witness.

Justice STEPHENS. The Court thinks it had better hear it. It is pretty difficult to rule in vacuo. We had better hear the testimony, and then perhaps counsel would like to look at these other cases to which the Court has referred, and we will hear you briefly on them and then make a ruling.

You may call the witness and put on the testimony, subject to a motion to strike it out.

Before that happens, apparently Mr. Adams has something.

Mr. ADAMS. If the Court please, with respect to the point that I raised on Exhibit 324, Your Honor was going to inquire of the Government when they wanted to  
3065 deal with that.

This phase of the case that you are going into now does not directly affect my client, and I had planned not to be here for the balance of this week. Of course, if it is convenient to the Court for me to be here, I can.

Justice STEPHENS. How much time do you wish to reply in the way of a written memorandum, if you wish to present one, in reply to Mr. Adams' motion to strike out Exhibit 324 on the ground that he has now discovered, in looking at it since its admission, that it was not verified and that the Federal rule requires verification of a pleading if it is to be introduced in a subsequent action as an admission?

Mr. STEFFEN. We would be very glad to have until Monday, and that will allow us not to interfere with any witnesses.

Mr. ADAMS. That will be fine as far as I am concerned.

Justice STEPHENS. Then the Government will present a

memorandum on Monday, please.

Thereupon, J. R. SPEASE, the witness on the stand at the time of adjournment, resumed his testimony as follows:

DIRECT EXAMINATION (resumed) by Mr. KNUFF.

3066 Q. Mr. Spease, at the conclusion of yesterday's testimony, I was directing your attention to a visit you had with a Mr. Emil Hansen, in 1933. Do you recall—now don't tell me the circumstances—do you recall just exactly where we left off yesterday?

A. I think so.

Q. Did you meet Mr. Hansen?

A. I did.

Q. And it was in 1933?

A. Yes.

Q. Where did you meet Mr. Hansen?

A. At the Statler Hotel in Buffalo.

Q. What was the purpose that you had in going to Buffalo to see Mr. Hansen?

A. To arrange to buy plaster and board as a jobber.

Q. You say you went up there to arrange to purchase plaster—

A. (Interposing.) To arrange to purchase plaster and board as a jobber, to take care of our trade.

Q. Did Mr. Hansen, as a representative of the Oakfield Gypsum Company, have plaster and board to sell?

A. He had both to sell to dealers. He said he could sell us plaster, but he was not permitted to sell us board.

Q. Was any question raised as to your ability to pay?

A. No, sir.

3067 Q. Did you buy board from Mr. Hansen at a jobbers' discount?

A. We did not.

Q. Will you state, please, just what Mr. Hansen told you?

A. "We don't have enough in it to divide with you, and if we did sell you at a discount and the United States Gypsum find it out, they will refuse to sell us board."

Q. Was the United States Gypsum Company selling board to Oakfield at that time?

A. No, they bought it through the Kelley people, and some from one other firm, I think.

Q. Is that all of the conversation that you had with Mr. Hansen at that time?

A. All of any importance.

Q. Were you able to buy plaster from him?

A. Yes, sir.

Q. And did you buy plaster from him at a jobber's discount?

A. We did until they sold out.

Q. And when did they sell out?

A. I just forget the date, but it is —

Q. (Interposing.) In 1938?

A. I think so.

Q. And they sold out to National, is that correct?

3068 A. That is correct.

Q. I show you, sir, what has been marked for Identification as Government's Exhibit 356, the same being a letter dated April 24, 1933, addressed to the Fairmont Wall Plaster Company and signed Emil Hansen. Did you receive that letter, Mr. Spease?

A. Yes.

Mr. KNUFF. I now offer in evidence Government's Exhibit 356.

Justice JACKSON. Were the others all offered, Mr. Knuff?

Mr. KNUFF. Yes, Your Honor.

Justice JACKSON. And received?

Mr. KNUFF. Yes, Your Honor. I offered 11 at once, from 345 to 355.

Justice STEPHENS. I suppose what you are offering it for is primarily the last paragraph?

Mr. KNUFF. That is right, Your Honor.

Justice STEPHENS. And that is one of the statements by Hansen which is in issue under this question of evidence?

Mr. KNUFF. Yes.

Justice STEPHENS. It may be received subject to a motion to strike.

(The document marked as Government's Exhibit No. 356 was received in evidence.)

3069 By Mr. KNUFF.

Q. Do you know Mr. Eldred?

A. I do.

Q. Is he connected with the Oakfield Gypsum Products Company?

A. He was the Treasurer.

Q. In 1933, did you see Mr. Eldred in Washington, D. C.?

A. I did.

Q. Can you tell us about when that was, in the summer or fall?

A. It was at the time there was a Code meeting here

in Washington. I have the date somewhere here.

Q. Was it in the summer, would you say, the late summer or early fall, or when? The date in and of itself is not particularly material.

A. I think it was in the early winter.

Justice STEPHENS. If it was a Code meeting, it must have been after June, Mr. Knuff.

Mr. KNUFF. That is right.

Justice STEPHENS. The Court can testify on that subject if necessary. (Laughter.)

By Mr. KNUFF.

Q. Mr. Eldred was connected with the Oakfield Gypsum Products Company, was he not?

3070 A. He was Treasurer, yes.

Q. At that time did you attempt to purchase board and plaster from the Oakfield Gypsum Products Company at a jobber's discount?

A. I did.

Q. And did they have board and lath for sale?

A. They did, to dealers only.

Q. Was there any question raised as to your ability to pay for that board?

A. At no time.

Q. Were you able to buy any board, and plaster, at a jobber's discount?

A. No, sir.

Q. Were you able to buy plaster at a jobber's discount?

A. In one or two instances, one instance, I think, yes.

Q. Now I am referring to the time when you met Mr. Eldred in Washington in the early winter of 1933.

A. Oh, no.

Q. Did you buy plaster from him at that time?

A. Yes, sir.

Q. You did?

A. Up to the day they sold out.

Q. You say that Mr. Eldred did not raise any question as to the credit standing of Fairmont Wall Plaster

3071 Company, is that correct?

A. That is correct.

Q. Now where did you have this conversation with Mr. Eldred?

A. I met him at the Washington Hotel, and we walked back and forth up to where there was supposed to be a Code meeting, I think, either at the Washington Hotel or the old Powhatan, which has had its name changed.



Q. The Powhatan is on 18th and Pennsylvania, and is now known as the Roger Smith, is that correct?

A. That is correct.

Q. What did you talk about?

A. About our ability to continue to sell our dealers, and purchase both plaster and board as jobbers.

Q. Will you relate, as nearly as you can, the exact conversation, or if you can't give us the exact conversation give us the substance of that conversation, Mr. Spease?

Mr. BROMLEY. I assume this is still in connection with the offer of proof?

Mr. KNUFF. It is.

Justice STEPHENS. Yes, it is all being received subject to a motion to strike.

The WITNESS. Eldred said, "Spease, you know we can't sell you board. I am not going to be able to sell you 3072 plaster at a discount."

By Mr. KNUFF.

Q. Did he say why he couldn't sell you board?

A. He did.

Q. What did he say?

A. He said, "You well know that the U. S. Gypsum Company won't permit us to, and the only thing I know to do with you, we are whipped, we can't sell you board, and we will have to stop selling you plaster. And we are a small concern, and have a lot of plaster to sell, and want to sell it, and the only way I know that we can sell you plaster is to give you a contract for 4 or 5 years, and that will take care of you for a while."

Q. And were you able to buy board from Oakfield Gypsum Products Company?

A. No, sir, not as a jobber, but as a dealer.

Q. Did he give you that contract, or did you enter into a contract with him for the sale of plaster?

A. I agreed to it, and did enter into the contract, and it was executed a short time afterward.

Q. I show you what has been marked for Identification as Government's Exhibit 357, the same being a letter dated December 17, 1933, addressed to the Fairmont Wall Plaster Company, and signed by Oakfield Gypsum Products Corporation, T. P. Eldred. Can you identify that, Mr. Spease?

3073 A. Yes, I can.

Q. And is that the contract that you referred to

that Mr. Eldred said he would be willing to enter into with you?

A. It is.

Mr. KNUFF. If Your Honor please, we offer in evidence Government's Exhibit 357. It is offered simply to corroborate the testimony of Mr. Spease and is not offered for the purpose of a declaration of a co-conspirator.

Justice STEPHENS. It is offered to confirm the fact that he did enter into a contract at that time as a circumstance indicating that he, as he testifies, couldn't buy otherwise?

Mr. KNUFF. That is right, Your Honor.

Justice GARRETT. The copy which I have, I don't know whether it is complete or not. It is just one page. It is dated December 17, 1933?

Mr. KNUFF. That is correct, Your Honor. You should have three pages of it. If you don't, there has been a mistake on our part.

Justice JACKSON. Page 2 is dated 12/1/33.

Justice STEPHENS. And so is page 3.

Justice GARRETT. That is what confused me.

Mr. KNUFF. I see that. Page 2 is dated 12/1/33, and page 3 is dated the same way.

By Mr. KNUFF.

3074 Q. The contract that you have before you is the contract that was accepted by you, is that correct?

A. It is.

Q. And you will notice that the second page bears the date 12/1/33, and the third page bears the date 12/1/33, while the first page bears the date December 17, 1933. Do you notice that?

A. Yes, sir.

Q. Can you explain that discrepancy at all?

A. We had some discussion about dating it back some. I don't know whether that entered into it or not.

Q. But nevertheless, this is the contract?

A. Yes, sir.

Justice STEPHENS. It may be received in evidence —

Mr. BROMLEY (interposing). Is this still a part of the offer of proof?

Mr. KNUFF. This portion of the offer right now isn't. But I am just taking these up in chronological order. The next two will be a part of the offer.

Mr. BROMLEY. If it is not a part of the offer of proof, I object to it on the ground that it is incompetent, irrelevant and immaterial.

Mr. KNUFF. May we take it up out of order, Your Honor?

Justice STEPHENS. Just a moment.

3075 Laying aside, Mr. Bromley, the question of Mr. Hansen's and Mr. Eldred's declarations, and their admissibility, there is a charge in the complaint that jobbers were eliminated, and this witness has testified that this company declined to sell him as a jobber, and that in consequence he had to take out a different form of contract, a dealer contract. Is this not admissible under that issue of the complaint, as a circumstance tending to confirm his statement that he did buy on different terms from jobber terms?

Mr. BROMLEY. Well, the purpose of my objection is, of course, that it can not be binding on any defendant.

Justice GARRETT. If I may interpose, I don't quite get the point of your offer, Mr. Knuff. You stated that it was offered by way of confirmation.

Mr. KNUFF. To corroborate the witness' statement.

Justice GARRETT. In corroboration of Mr. Spease's oral testimony?

Mr. KNUFF. That is correct.

Justice GARRETT. Well, if it is even that, why doesn't it come within the class of this offer of proof, subject to being stricken? The verbal testimony is offered in that way. Wouldn't any corroborative testimony come in the same class?

Mr. KNUFF. I think the other comes in as hearsay, Your Honor, if it comes in at all, as an exception to the  
3076 hearsay rule. I don't believe that this would come within the purview of the offer, and it is not offered as a part of the offer. Probably it is a little bit out of place, but I was just taking it up at the time because it seemed to me to be the logical place to put it in evidence because of the testimony of the witness.

Justice STEPHENS. I don't quite see yet the force of your objection, Mr. Bromley, laying aside this question of the admissibility of declarations. This isn't offered on that theory, this isn't offered to prove the contents of the contract. It is merely offered to show that a contract was entered into at this time to buy as a dealer rather than as a jobber.

Now it is only introduced as a circumstantial item tending to confirm the witness' testimony that he did stop buying as a jobber and start buying as a dealer. The complaint charges, and the Court has ruled—no, I think there has

been no issue on that subject within our previous reserved rulings—the complaint charges the elimination of jobbers. Isn't this man's testimony that he did no longer buy, as a jobber, the materials which are involved in this case, admissible in evidence as a part of the chain of proof which the Government is entitled to make that he was eliminated as a jobber? What he did may not alone prove the whole story, but if it can also be proved that he was  
 3077 eliminated because USG, and the other defendants who are charged with it, conspired to and did require his elimination, why isn't the fact of his elimination provable?

Mr. BROMLEY. Well, the force of my objection was just exactly what Judge Garrett said, it seems to me, that it can only be material in connection with the offer of proof. Our point is that this is merely an act or a declaration, at most, by someone who is not a party to the conspiracy, just as though the Government picked up a man on the street and tried to get him to testify that he wouldn't sell to a jobber, and tried to prove that jobbers were eliminated because somebody not connected, not alleged to be connected with any conspiracy, wouldn't sell a jobber.

This Oakfield Company is not a defendant, not a co-conspirator, and we say that both its declarations and its acts are entirely immaterial.

Justice STEPHENS. Well, I think the declarations are within the offer which is being received subject to a motion to strike; but laying aside that aspect of the case, do you contend that the Government is not entitled to prove that a jobber who had been a jobber did no longer act as a jobber, and thereafter connect that by other proof that the reason he didn't was because USG and the other defendants forbade it? The conduct of the alleged jobber, what he did or did not do, would seem to be a part of the Government's  
 3078 case, if it can prove it.

Mr. BROMLEY. I didn't understand that they could attempt to prove that this jobber was eliminated due to what the defendants did either by declaration of someone not a conspirator or by any act of someone not a conspirator.

Justice STEPHENS. Now you get back to the question of the admissibility of these declarations. It may be that the declarations will be determined to be not admissible. But as I understand you, laying quite aside the question of declarations, you are contending, are you not, that under the charge in the complaint the fact that this man did no longer, after



a certain time, act as a jobber can not be proved in evidence as a part of the Government's case? How can you prove that a man is no longer a jobber except by calling him and asking him whether or not he continued to act as a jobber? Is the Government required to call a third party to testify that they couldn't any longer buy from this man as a jobber?

Mr. BROMLEY. Isn't it clear that the fact as to whether he is or is not a jobber is not material under any charge in the complaint? The charge is that the defendants agreed to eliminate jobbers. The proof is that the licensor issued the bulletins which leveled off the jobber price at the same figure as the dealer price. Well, if that eliminated jobbers, that is a question of law, there isn't any dispute about the proof, it is already in the case.

Justice STEPHENS. I may be dull, Mr. Bromley, but I just can't get your point. If the Government charges that jobbers were eliminated, and that the elimination took place as a result of the bulletins and the prices fixed therein, it would seem to me that it would be required, as a part of its case, to prove two things: first, that the bulletins were of such nature as would be likely to eliminate jobbers; and, secondly, that jobbers were eliminated. How can it prove that jobbers were eliminated without calling the jobbers to testify that they no longer did business as jobbers?

Mr. BROMLEY. I should think it could call a jobber to say that after the USG issued the price bulletin, the witness jobber had to pay the defendants the dealer price for patented board. I should think they could do that. But where does it get us anywhere to call a jobber who isn't buying from any of the defendants, and who says, "I tried to buy from somebody else not a party to the conspiracy, and I found that I had to pay the dealer price."

Justice STEPHENS. That, I suppose, is a question of connection. Of course, if the Government doesn't prove that his having to start buying at a dealer price rather than a jobber price was the consequence of some pressure brought to bear by the defendants upon the Oakfield Gypsum Products Company, then the evidence means nothing.

Mr. BROMLEY. My point is that they are trying to prove the elimination of jobbers by the act or the declaration of someone not a co-conspirator. Now this rule applies to acts as well as it does to declarations, this agency theory which makes binding upon the defendants something that somebody else does. That applies to acts as well as to declarations.

rations. And you have ruled that the declaration of Hansen of Oakfield is not admissible because Oakfield is not a co-conspirator. That was ruled yesterday.

Now by the same token, what Oakfield did is on the same level, isn't it, with what Oakfield said? I don't believe they can prove the elimination of jobbers by proving acts of companies, such as Oakfield, not alleged to be co-conspirators.

Justice STEPHENS. Unless, Mr. Bromley, it is shown that what Oakfield did was compelled by USG and the other defendants. Certainly if the Government can show that what Oakfield did it was caused to do by the other defendants, that kind of an act would be admissible as a part of the chain of proof that jobbers were eliminated.

Of course, the mere act of a person not a co-conspirator, looked at alone, would have no binding force, any more than the declaration, because it can't bind the co-conspirator since it is not the act or the declaration of a co-conspirator. The Court is not confused on that subject.

3081 But as I understand it, the Government is not offering this aspect of this witness' testimony to prove anything except the actual stoppage of jobbing on this person's part, and this item of evidence which has brought up this argument is merely a circumstance and confirmation of that.

It doesn't seem to the Court to go to the question of the admissibility of an act or declaration of co-conspirators. It seems to go to the question whether or not he continued to act as a jobber or a dealer. Of course, there has to be other proof on the subject. Unless it is connected up by showing that his alleged elimination as a jobber was the result of some pressure brought upon him, through Oakfield, by USG and the other defendants, then the evidence means nothing.

But how can the Court deny one item of the evidence until the Government has had a chance to prove it all? I may be mistaken, I will have to confer with my colleagues about it.

Mr. BROMLEY. Here is the point that it seems to me I do not make myself clear on, and that is that I don't believe the proof that you say may be forthcoming, that the defendants compelled Oakfield to do this, is material. There is no charge to that effect because they are not alleged to have been co-conspirators. The allegation is

3082 that the defendants agreed to coerce them to observe our prices.

Justice STEPHENS. Where is that in the complaint?

Mr. STEFFEN. Paragraph 45 (e).

Justice STEPHENS. There is another paragraph with respect to jobber elimination. Paragraph 45 (d) says:

"Concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area, and concertedly refusing to sell said products to jobbers at prices below said companies' prices to dealers, for the purpose, and with the effect, of eliminating substantially all jobbers from the distribution of said gypsum products in the Eastern area;"

Now there is another paragraph on that subject, is there not, Mr. Knuff?

Mr. KNUFF. I am looking for it, Your Honor.

Justice STEPHENS. Paragraphs 94 and 95. Paragraph 94 reads:

"For the purpose of limiting jobber distribution by the licensees to those jobbers who sold only to dealers and who maintained bulletin prices in sales to dealers, the defendant companies agreed in their license agreements to sell to jobbers only with the express consent of U. S. G. Pursuant to said agreement, U. S. G., during the period  
3083 from 1929 to 1932, permitted its licensees, including the defendant companies who were then licensees, to sell only to jobbers who sold to dealers and who maintained bulletin prices in said sales."

Paragraph 95 refers to meetings.

Apparently Mr. Bromley's point, Mr. Knuff, which I haven't until this moment perhaps understood, is that your charge is that the defendants agreed to sell to jobbers only with the express consent of USG, and therefore your proof must be limited to proving, that is, your evidence must be limited to proving that some defendant, charged as a defendant in this case, declined to sell to Mr. Spease's company as a jobber, but only as a dealer; whereas, what you are now proving is that some non-co-conspirator, some third person, the Oakfield Gypsum Products Company, refused to sell.

Mr. KNUFF. That is correct.

Justice STEPHENS. What do you say to that?

Mr. KNUFF. We are trying to show here —

Justice STEPHENS (interposing). Of course, we have

definitely ruled about Oakfield—my colleagues, who construe the complaint more broadly than I do, as indicated in yesterday's ruling, nevertheless think that the complaint is not broad enough to include persons as co-conspirators not named as defendants. Now what do you say to Mr.

Bromley's point?

3084 Mr. KNUFF. I say that the charge in the complaint is that jobbers were eliminated from the distributive system, and here we have a case where the man was unable to buy board at a jobber's discount; and in order to corroborate his testimony that he was unable to buy board at a jobber's discount, whether from the defendants themselves, we introduce in evidence the contract that he entered into with the Oakfield Gypsum Products Company as corroborative of his previous testimony, and also to prove that jobbers were eliminated from the set-up.

Justice STEPHENS. Well, of course, this contract which is now under discussion can't be raised to a higher level of admissibility than the act which it is introduced to confirm, and so the real question is whether or not—and this is quite apart from the question of declarations—you can show, under the charge in your complaint, that someone other than the defendants refused to sell Mr. Spease as a jobber. That, apparently, is Mr. Bromley's point, which I hadn't seen until your last statement, Mr. Bromley, until I re-read this Paragraph 94. That is a different question.

I understood you were contending, Mr. Bromley, that the Government was forbidden to show that jobbers were eliminated. I still can't see how that can be denied if

3085 it is shown that the defendants eliminated them.

And I thought what the Government was trying to show here was that the method of elimination was a chain, so to speak; that the defendants carried out their agreement alleged in paragraph 94 by refusing to permit those who dealt with them to sell to jobbers. But perhaps that is outside the charge.

What is the rest of your case on this subject, Mr. Knuff? We mustn't rule in the dark. How do you intend to connect this up with the defendants? Are you going to show that the defendants, or some one of the defendants, USG or someone else, declined to allow the Oakfield Company, which was not a licensee, to sell to Mr. Spease's company as a jobber?

Mr. KNUFF. The next two exhibits will show that, the one which I have before me, which will be marked 358, and



the next one, dated April 27, 1935, which will be marked Exhibit 359. There is definitely the statement in there as to what the USG did. We intend to call Mr. Eldred, who received the word from USG, and put Mr. Eldred on the witness stand, and have him testify.

Mr. BROMLEY. May I say, Your Honor, does Mr. Knuff mean by that that he intends to show that USG ever withdrew or cancelled a consent to sell to Oakfield which it had issued to any licensee at any time? I don't believe he means that, because that isn't the fact.

Mr. KNUFF. I didn't say that we will show that they did cancel. What I mean to say, and what I do say  
3086 now, is that the threat to cancel was sufficient to induce Oakfield to obey the commands of USG.

Justice STEPHENS. Threats by whom to cancel what?

Mr. KNUFF. The threat by USG to withdraw their consent from Kelley to sell to Oakfield.

Here is the situation, Your Honor, and it is in evidence. Under the license agreements, before a manufacturer can sell to a manufacturing distributor he has to have the consent of USG in writing. We will show—probably tomorrow or the next day —

Justice STEPHENS (interposing). We are mixing this, all up by talking about three different classes of persons at one time, and that is one reason I think the Court is so puzzled. We were talking yesterday about resale price fixing of manufacturing distributors. This man isn't a manufacturing distributor; he is a jobber.

Mr. KNUFF. If you will just bear with me, I don't think there will be any confusion.

Justice STEPHENS. Very well.

Mr. KNUFF. Before a manufacturer like Certain-teed or Ebsary or Kelley or National or Texas could sell to a manufacturing distributor—and Oakfield was a manufacturing distributor—they had to have the consent of USG. That is in the license agreements executed between USG and the various licensee. It is on page 74 of the  
3087 complaint, paragraph 9 —

Justice STEPHENS (interposing). Let us look at that before you go on. Let's have each step in your reasoning before us as we go along.

(Complaint examined by the Court.)

Justice STEPHENS. All right, proceed.

Mr. KNUFF. Now when Kelley, or when any of the other companies, wanted to have USG's consent to sell to a manufacturing distributor, they would write to USG and

ask USG for their permission to sell. USG would come back, "This will acknowledge receipt of your letter of such-and-such a date. You have our consent to sell to the Connecticut Adamant Company at the following discount. It is understood that this consent may be withdrawn by us at any time."

Now there was a threat or there was a potential lever that USG could exercise against any manufacturing distributor: USG could say to this manufacturing distributor, "Don't you sell to Spease. If you do sell to Spease, we will withdraw the consent that we have given Kelley to sell to you." And that is exactly what we are going to show.

Justice STEPHENS. That is, you intend to prove that USG impliedly made a threat directly to the manufacturing distributor himself, not through the licensee defendant, that if it sold to jobbers it would no longer get products 3088 as a manufacturing distributor?

Mr. KNUFF. We are going to endeavor to show that USG contacted Oakfield Gypsum Company and told Oakfield Gypsum Company that if they went ahead and sold Spease, that USG would withdraw their consent from Kelley to sell to Oakfield.

Justice STEPHENS. The question Mr. Bromley still raises, I assume, is that you haven't charged that. You have charged in paragraph 94 that defendant companies agreed in their license agreements to sell to jobbers only with the express consent of USG.

Mr. KNUFF. We have specifically charged coercion, Your Honor.

Justice STEPHENS. Well, I suppose we get again into the question of how much the subsequent paragraphs of the complaint limit paragraphs 44, 45, and 46.

Mr. KNUFF. In paragraph 45 (e) there is a definite charge of coercion. I don't think there can be any mistake about that.

Justice STEPHENS. Do you wish to be heard further, Mr. Bromley, on this subject?

Mr. BROMLEY. I think I ought to say that I believe there to be a distinction between what I have been arguing about up to now, and what he says he is going to show. If he can show that USG withdrew from Kelley the consent which it had issued to Kelley to sell to Oakfield, or went to Oakfield and said, "Now, you do what I 3089 say or I will withdraw the consent", then I should

think that would be material, that is something we did.

Justice JACKSON. That is what he proposes to prove.

Mr. BROMLEY. That is what he says he proposes to prove.

Mr. KNUFF. And that is what I think I am going to prove, and I make that statement in good part.

Mr. BROMLEY. I don't think that aids him any in this class of proof which he is now offering, having to do solely with Oakfield and what Oakfield did or said.

Justice STEPHENS. Mr. Knuff's reply to that, I suppose, will be that what Oakfield did is some evidence to be looked at in connection with other evidence tending to prove what Mr. Knuff claims the Government can prove, that it all was inspired or coerced by U. S. G.

Mr. BROMLEY. I think that the answer to that is that it can only be binding on us if Oakfield was alleged to be a co-conspirator, which it is not.

Justice JACKSON. You are offering this contract merely to corroborate the testimony of Mr. Spease, aren't you?

Mr. KNUFF. That is right.

Justice JACKSON. To illustrate it?

Mr. KNUFF. That is right.

I thought I had made it clear that we weren't offering it as a declaration.

3090 Justice STEPHENS. The exhibit can't rise any higher than that which it is offered to confirm.

Justice GARRETT. Mr. Knuff, may I ask you this: If it should be held that the verbal testimony which Mr. Spease has given should be stricken, this would go with it, wouldn't it?

Mr. KNUFF. I think so.

Justice STEPHENS. Well, with great deference to my colleagues, both of whom have suggested that solution, it doesn't solve the problem for me, because as I understand it you are offering two things by this witness: You are offering what my colleagues have referred to as verbal testimony, by which I assume they mean the declarations of Mr. Hansen and Mr. Eldred as to why they did or did not do certain things. Of course, if this is only to confirm that, and that goes out, then of course this exhibit we are now discussing goes out. But also, you are offering it to prove not merely what Mr. Eldred and what Mr. Hansen said, but what Oakfield did or did not do, and as a result what Spease and his company did or did not do as jobbers. Now that is also objected to by Mr. Bromley on the ground that it is the act of a person not charged

as a co-conspirator, and therefore can not bind a co-conspirator.

Mr. KNUFF. But it seems to me that it all comes back to the fact that under paragraph 45 we have stated that jobbers were eliminated, and this would certainly  
3091 tend to prove the elimination of the jobbers also.

Justice STEPHENS. Well, I think we will have to hear it all, subject to a motion to strike all of this witness' testimony, so we can have an opportunity to relate it together in our minds and have a conference on it at recess, and also hear a discussion of these cases to which the Court has referred this morning. So it will all be received, and this exhibit will be received, subject to a motion to strike.

(The document marked as Government's Exhibit No. 357 was received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, in 1935 were you submitting quotations or bids to the Government for plasterboard on Government work?

A. Yes.

Q. And from whom did you intend to secure your supply of plasterboard?

A. From the Oakfield Gypsum Company.

Q. And had you made arrangements with the Oakfield Gypsum Company to secure that board?

A. Yes, sir.

Q. I show you, sir, what has been marked for  
3092 Identification as Government's Exhibit 358, the same being a telegram dated 4/27/35, signed T. P. Eldred, and also Government's Exhibit 359 for Identification, the same being a letter dated April 27, 1935, addressed to the Fairmont Wall Plaster Company and signed T. P. Eldred.

Did you receive the telegram?

A. Yes, sir, we did.

Q. Did you receive the letter, that is Government's Exhibit 359?

A. Yes, we certainly did.

Q. You say, sir, that you had arranged to purchase board from Oakfield in order to carry out, if you were successful, your bid to the Government; is that correct?

A. Yes.

Q. Was there any question raised as to your ability to pay for that board?



A. None whatever.

Q. Had you always discounted your bills with Oakfield?

A. Yes, sir.

Q. Did Oakfield have board to sell?

A. Yes, sir.

Q. Were you able to buy the board from Oakfield at any price?

A. Yes, sir, as a dealer.

Q. In 1935, Mr. Spease—will you look at Exhibit 359—were you able to secure that board in April, 1935, 3093 in order to complete your bid?

A. Yes.

Q. Were you able to get that board?

A. Yes.

Q. Did you get the board?

A. No, they sent us a telegram that we were withdrawn, and we couldn't do it.

Q. That is what I asked you, were you able to buy any board from Oakfield?

A. No, sir, the USG ruled we could not.

Mr. BROMLEY. I move that that be stricken out.

Mr. KNUFF. I think that should go out.

Justice STEPHENS. It may go out.

Mr. KNUFF. If Your Honor pleases, we now offer in evidence Government's Exhibits 358 and 359.

Justice STEPHENS. Let me read them.

Mr. KNUFF. I wonder if we could have a few moments recess?

Justice STEPHENS. Just a moment, let us read these first before we recess.

(Exhibits 358 and 359 examined by the Court.)

Justice STEPHENS. The Court will be in recess for five minutes.

(Thereupon, a short recess was taken.)

3094 Justice STEPHENS. Proceed.

Mr. KNUFF. I believe I had offered these exhibits in evidence.

Mr. BROMLEY. Are these offered, Mr. Knuff, in connection with the offer of proof, or aren't they?

Mr. KNUFF. They are.

Justice STEPHENS. These are declarations of Eldred, in other words, for Oakfield?

Mr. KNUFF. That is right.

Mr. BROMLEY. I think I should object to Exhibit 358 for identification on the special ground that it is incompetent because there is no identification of it whatsoever.

It doesn't make any sense to me. It is addressed to Utica, New York. It all seems to be in one handwriting; whose handwriting, we do not know. Where it came from has not been testified to; or what it is, has not been testified to really.

Justice STEPHENS. Judge Jackson would like to have you read the statement of the witness in connection with Exhibit 358 and see what he did say about identifying it.

(Thereupon, the reporter read the record as requested.)

Justice STEPHENS. It seems to us, that it is not identified, that is, Exhibit 358 for identification. The witness does not testify whose handwriting it is in. He doesn't say that he knows the handwriting of Eldred. He simply says that he received this message. Can you identify it better by this witness?

3095 By Mr. KNUFF.

Q. In whose handwriting is this, Mr. Spease?

A. Mr. Eldred's headquarters were at Utica, New York —

Justice STEPHENS (interposing). Answer the question. Do you know whose handwriting this is in?

The WITNESS. The one I have is a copy.

Justice STEPHENS. Look at the original.

The WITNESS. Yes, that is T. P. Eldred's writing, I recognize it.

Mr. OLIVER. If your Honor please, he is looking at the letter.

Justice STEPHENS. I am referring to the telegram, not the letter.

The WITNESS. That is a telegram received by our office and O. K'd by G. C.—Grace Cooper.

Justice STEPHENS. Answer the question—do you recognize the handwriting in that telegram?

The WITNESS. Yes, sir.

Justice STEPHENS. Whose is it?

The WITNESS. It is Grace Cooper's, a girl in our office that took it.

Justice JACKSON. When you say "took it", you mean received it over the telephone and wrote it down?

The WITNESS. Yes, sir. Western Union phones all our telegrams.

3096 Justice STEPHENS. Do you object to the identification of the letter, Exhibit 359, Mr. Bromley?

Mr. BROMLEY. No, your Honor.

Justice GARRETT. That letter says that a copy of the

telegram was enclosed with it. But what you have offered the witness there is something that was telephoned and received at their office.

Mr. KNUFF. That is right.

Justice GARRETT. You don't have the copy that was enclosed with the letter?

Mr. KNUFF. We do not, your Honor. He first sent a telegram, which is Government's Exhibit 358, as we understand it, taken by Miss Grace Cooper; and later on, on the same day as the letter will indicate, Mr. Eldred sent a copy of the telegram with this letter. We do not have it, we do not have a copy of the telegram, and I don't know as we ever had it. I am referring to the telegram that was enclosed with this letter.

Justice STEPHENS. Well, Judge Garrett and myself feel that there is no sufficient identification. Judge Jackson disagrees. Therefore, Exhibit 358 is excluded.

By Mr. KNUFF.

Q. Mr. Spease, was there a telegram enclosed in the letter of April 27, 1935, which is Government's Exhibit 359? Please look at that letter.

3097 A. According to the letter, there was a telegram enclosed.

Q. Will you look at Exhibit 358? Are you able to state that the telegram, which is dated 4-27-35, is a copy of the telegram that was enclosed with the letter of April 27?

Mr. BROMLEY. I object to that —

The WITNESS (interposing). Yes, sir.

Mr. BROMLEY (continuing).—as incompetent, because it calls for a conclusion, and move to strike the answer.

Mr. KNUFF. I am asking if he is able to state, I don't believe that that is any conclusion at all. I am asking him whether he is able to state if this telegram, Exhibit 358, is the same telegram that he received in the letter of April 27, 1935.

Mr. BROMLEY. That is objected to as incompetent.

Justice STEPHENS. Do you remember the words of the telegram you received in that letter—do you now remember them? Answer that "yes" or "no".

The WITNESS. No, no, sir.

Justice STEPHENS. How can he state whether this is a copy or not, then?

Mr. KNUFF. Well, I think he may not know whether the exact periods are there, but here is a telegram received

in his office by Grace Cooper. He afterwards received a letter in which a copy of the telegram was enclosed. Now

I think that it is drawing the line pretty fine for  
3098 an objection to be made that this telegram here cannot be identified by the witness as containing almost the substance of what was in the telegram, from Mr. Eldred.

If necessary, we can bring Grace Cooper up here. He recognizes her signature, and we can bring her up here. It seems to me just to be placing a premium on legal procedure. We can bring her up here and she will identify this telegram.

Justice STEPHENS. I don't see how that would improve the situation. I should think the one you need is Mr. Eldred.

Mr. KNUFF. If she gets the telegram from the telegraph office?

Mr. BROMLEY. I thought you said you were going to have Mr. Eldred here?

Mr. KNUFF. So what?

Justice GARRETT. Mr. Knuff, let me ask you—don't you have everything in the letter that is in the telegram?

Mr. KNUFF. I think we do.

Justice GARRETT. It seems to me we are taking up a lot of time over a very trivial thing here. You have everything in the letter that is in the telegram, it seems to me, and Mr. Bromley is not objecting to the letter on the ground of identification.

Justice STEPHENS. Well, the telegram is excluded as not identified. The letter is received, subject to the motion to  
3099 strike the testimony when we complete the argument on the subject.

(The letter marked as Government's Exhibit No. 359, was received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, were you able to purchase board from the Fairmont Wall Plaster Company at any price to complete your bid with the Government, in 1935?

A. You say for the Fairmont Wall Plaster Company?

Q. Were you able to purchase board from the Oakfield Gypsum Products Company at any price to complete the contract or the bid, rather, that you had submitted to the Government?

Mr. BROMLEY. I object to that as incompetent —

The WITNESS (interposing). No, sir.



Mr. BROMLEY (continuing).—because it calls for a conclusion; and I move to strike the answer. The question is—was he able to?

Mr. KNUFF. Did you?

Mr. BROMLEY. Do you withdraw the previous question?

Mr. KNUFF. No, I think that "were you able to" or "did you" connote the same thing.

Justice STEPHENS. If that is what you mean, he may answer the question.

The WITNESS. No, sir.

3100

By Mr. KNUFF.

Q. In 1938, sir, did you attempt to purchase gypsum board and plaster from National Gypsum Company?

A. Yes, sir.

Q. I show you what have been marked for identification as Government's Exhibits 360 and 361, Government's Exhibit 360 being a letter, dated July 23, 1938, addressed to Mr. M. H. Baker, president, and signed Fairmont Wall Plaster Company, President; and Exhibit 361 for identification being a letter dated July 26, 1938, on the letterhead of the National Gypsum Company, addressed to J. R. Spease, and signed M. H. Baker, President.

Did you write the letter dated July 23, 1938, to Mr. Baker?

A. Yes.

Q. And the exhibit that you have before you is your carbon copy of that letter, is that correct?

A. Yes, sir.

Q. Did you receive, in reply to that letter, Mr. Baker's letter of July 26, 1938?

A. Yes, sir.

Q. Were you able to purchase board and plaster from the National Gypsum Company?

A. No, sir.

Mr. BROMLEY. I object to that as incompetent and move to strike the answer.

3101

By Mr. KNUFF.

Q. Did you purchase any board or plaster from the National Gypsum Company?

A. No, sir.

Mr. BROMLEY. May the previous answer be stricken?

Justice STEPHENS. It may go out.

Mr. KNUFF. We offer in evidence Government's Exhibits

Nos. 360 and 361.

Mr. BROMLEY. We make only the usual objection. I assume that this is not under the offer of proof, and that the offer of proof was concluded prior to the identification of Exhibit 360.

Mr. KNUFF. That is correct.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The letters marked as Government's Exhibits Nos. 360 and 361 were received in evidence.)

By Mr. KNUFF.

Q. Mr. Spease, will you tell the Court why you wanted to purchase gypsum board?

A. Yes, sir, to try to make a little money.

Q. What do you mean by that?

A. To sell the dealers that we had been selling for 29 years, other materials.

3102 Q. Would gypsum board aid you in any way in any other sales?

A. Very materially.

Q. How?

A. It would help sometimes to get the order for everything the man wanted by being able to sell him a few thousand feet of board.

Q. Well now, will you just explain that to the Court, please?

A. In either a straight or a mixed carload, sometimes there would be eight or ten different commodities used on one job, or used by one dealer, and if we could furnish them all, our men saw them often and we could perform a service that they were glad to have and they would give us the business in preference to giving it to different manufacturers.

Q. Was your business unique, that is, were you the only jobber that was jobbing gypsum board in 1930, or did you know of any other jobbers?

A. I think there were dozens of them.

Q. Can you name some of them?

A. Yes, I can. I have got a whole list of them. Teachout Company at Cleveland, Ohio —

Mr. BROMLEY (interposing). I object to this as incompetent, because hearsay.

3103 Mr. KNUFF. That is not hearsay. Here is a man that is engaged in the gypsum business. He knows

what other people are doing in that business, he knows who are the other jobbers in that business. He is testifying from his own knowledge.

Mr. BROMLEY. He only knows because he has heard, I assume.

Justice STEPHENS. Well, it hasn't been developed yet, Mr. Knuff, whether he is testifying from his own knowledge or not. If he has done business with these people, and knows of his own knowledge from having worked with them, and having done business with them, or having seen their plants or warehouses, or something of that sort, that they are in the jobbing business, he can say so.

If he is simply giving a description from some list furnished by someone, that is obviously incompetent. Bring out what he is testifying from.

By Mr. KNUFF.

Q. Mr. Spease, as an official of Fairmont Wall Plaster Company, did you travel on the road for Fairmont Wall Plaster Company?

A. About twenty-five years, around all over the country.

Q. And through what sections of the United States did you travel?

A. Primarily about six or seven States, but I was everywhere, and we had conventions, I knew all of these people, and many of the older men are dead and gone from these building supply companies that I knew years ago, 3104 but their businesses are still there.

Q. What States did you travel in?

A. West Virginia, Virginia, the District of Columbia, Maryland, Pennsylvania, some parts of Ohio, and North Carolina, and whenever any general contractors had jobs in our State, which they did, or in our territory, I usually went to see them to New York, Chicago, or Cleveland, and I met these different men and met their sons. At one time I knew nearly all the jobbers in the country.

Q. And you say you traveled for a period of twenty-five years?

A. Yes, sir.

Q. Are you acquainted with other jobbers that jobbed plasterboard and plaster in the United States?

A. Yes, sir, many of them.

Q. Did you know them personally?

A. Some of them I did, and some I did not.

Q. And can you name some of those that you knew?

A. Yes, sir.

Q. Please do it.

Mr. BROMLEY. The same objection. He is again going to his list. It is obviously based on what he heard.

Justice STEPHENS. Are you using the list to refresh your recollection? Can't you tell us from your own memory?

3105 The WITNESS. Yes, sir.

Justice STEPHENS. Go ahead and do it, then.

The WITNESS. The Perry Manufacturing Company, down at Perryopolis, Pennsylvania; the old Crown Wall Plaster Company at Braddock.

By Mr. KNUFF.

Q. Pennsylvania?

A. Pennsylvania. The Cleveland Builders Supply, at Cleveland. The old Ruggles Company at Columbus, Ohio; Fisher Brothers, at Memphis. I am trying to think of one at New Orleans, I know him well. I would pretty near have to refer to my list for some of their addresses and names which have slipped my mind.

Q. Do you mean that you would have to refer to the list that you have there?

A. Well, I have a list of all of them at home.

Q. I mean, is that the list you want to refer to that you have there?

A. Yes, I have many on here.

Q. Who made that list?

A. I made it up myself, from time to time.

Q. When did you make that list that you have in front of you?

A. I sat down and wrote that this morning.

Q. Do you know any person in Cleveland besides —

3106 A. (Interposing.) The Teachout Company.

Q. Now in New Orleans, did you know any jobbers?

Mr. BROMLEY. I object to his referring to his list. It seems to me this is still all incompetent because based on hearsay.

Justice STEPHENS. If the witness is using the list to refresh his recollection, and if he prepared it himself, and it was not given him by someone else, as I supposed was the nature of your original objection, I think that is not improper. The objection is overruled.



By Mr. KNUFF.

Q. Can you tell us somebody in New Orleans that was a jobber of plaster and board?

A. The Crescent Wall Plaster Company.

Q. Any others?

A. Yes, I have got a friend down there, a good friend, the head of a company, but I cannot recall his name. He jobbed the United States Gypsum plaster.

Q. Who is that?

A. I can't tell you.

Q. Where is he located?

A. In New Orleans.

Q. Did you ever hear of the Abbey Company?

A. Yes, but this is another one.

Q. Well, is the Abbey Company in New Orleans?

3107 A. That used to be the W. C. Abbey Company of Newark. Now that is in East Orange, I think.

Q. Did you know them?

A. Not Abbèy, no, sir.

Q. You didn't know Abbey?

A. No, sir.

Q. Do you know whether or not he was a jobber?

A. He was a jobber. I went to conventions, builders' supply conventions, all over this country, for thirty years, and knew everybody in the business, and had a handshaking with all of them. Many of them are dead and gone.

Q. Do the people you have named still job plasterboard?

Mr. BROMLEY. I object to that as incompetent, because that must be based on hearsay.

Mr. KNUFF. I think he knows: Here is a man that has been in the business twenty-five years.

The WITNESS. Forty-four.

Justice STEPHENS. Well, if the witness knows of his own knowledge whether they are still jobbing plasterboard, he may say so, but it must be developed that he does know that of his own knowledge.

By Mr. KNUFF.

Q. Do you know of your own knowledge whether or not these people that you have named now job plasterboard?

A. None of them do, no.

3108 Q. Do you know that of your own knowledge?

A. Yes, sir.

Mr. KNUFF. You may cross-examine the witness.

Justice STEPHENS. These other items in this set of exhibits which you have handed to us —

Mr. KNUFF (interposing). Are not going to be offered.

Mr. BROMLEY. I now move to strike out all of Mr. Spease's testimony with respect to the meeting with Hansen in 1933, and the meeting with Eldred.

Justice STEPHENS. You say the "meeting"—I didn't quite hear you.

Mr. BROMLEY. I said "meeting", I meant with reference to the meetings and conversations with Hansen and Eldred of Oakfield, which the witness said took place in 1933. That includes all of the testimony which he gave this morning, down to the point where Exhibit 360 was identified.

I make this motion on the ground that it is incompetent, immaterial and irrelevant; and of course I include in that motion, a motion to strike the exhibits offered during the course of that testimony.

Justice STEPHENS. Have you their numbers?

Mr. BROMLEY. They were Exhibits 356, 357 and 359.

Justice GARRETT. There is none of the testimony given yesterday that is included in your motion, is there?

Mr. BROMLEY. No, your Honor.

3109 Justice STEPHENS. Well, this motion presents the question we still have to determine, depending upon these authorities. The Court does not wish to rule upon it until it considers, and until counsel have had an opportunity to consider, these additional authorities.

We are, I think, agreed—I may say for the benefit of counsel—I think we are agreed here that neither the declarations nor the acts of a person who is not a co-conspirator and not charged as a co-conspirator, can be admitted as binding upon a person who is charged as a defendant conspirator.

But that isn't the problem here. As we understand it, the Government is now offering to prove that pressure was brought, and is offering this testimony as a part of a chain of evidence to prove that the United States Gypsum Company brought pressure through its licensees by threatening revocation of licenses if they did not control the actions of Oakfield as a manufacturing distributor, and its actions in respect of Fairmont as a jobber.

We still have the question, under that theory, whether or not the declarations of Eldred and Hansen may be admitted in evidence—because they are the statements of some person off the witness stand, not subject to cross-

examination, and therefore they are hearsay and therefore they must come in, if at all, under an exception to the hearsay rule.

We are back, therefore, to the question whether or not they are admissible as characterizing an ambiguous act which is legally in issue, an act which is legally ambiguous, or whether they are admissible under the authorities which the Court called counsel's attention to this morning, as showing state of mind.

Do you wish to cross-examine this witness before a ruling, or do you wish to take the recess now so that you can have an opportunity to examine those authorities, gentlemen?

Mr. BROMLEY. I am perfectly willing to start the cross-examination and defer the argument.

Justice STEPHENS. If you will do that, then, we will suspend a ruling upon that motion.

You may cross-examine and then after we resume this afternoon we will hear the discussion of those authorities and make the ruling.

#### CROSS-EXAMINATION by Mr. BROMLEY.

Q. When you were buying plasterboard at a discount from American, your discount was \$2 per thousand square feet on wallboard, wasn't it?

A. It has been a while ago, I don't recall.

Q. How much was it?

A. I would have to refer to our books.

Q. You don't remember now?

A. Not to be accurate, no, sir.

3111 Q. During that time your discount on lath was \$1.25 per thousand, wasn't it?

A. I am not sure.

Q. And during that time your discount on plaster was 10 per cent, wasn't it?

Mr. STEFFEN. I am not clear as to the time, your Honor, that these questions are directed to.

Mr. BROMLEY. During all of the times that he was getting the discount from American.

The WITNESS. That goes back twenty-nine years, it changed with the market.

#### By Mr. BROMLEY.

Q. Well, your discount on plaster that you bought from American was about 10 per cent, wasn't it?

A. I don't dare hazard a guess now.

Q. And you wouldn't dare hazard a guess as to whether or not your discount on wallboard was or was not \$2, would you?

A. It sounds like it was at one time, but I am not sure.

Q. You have got the figures right there in front of you, haven't you?

A. I will have to look.

Q. You really don't know, do you?

A. Not to be sure, no, sir.

Q. Didn't you write them down on one of the exhibits there in front of you which counsel did not offer in evidence?

3112 A. I don't think that I did.

Q. Well, look at it. You know what I am talking about, don't you?

A. Yes.

Q. Look at page 2 of the schedule of shipments.

A. If I wrote it down, I don't have it, I can't find it.

Q. Look at the schedule of shipments. You have got it in your left hand. Do you see it?

A. Oh, yes. It says \$2 on one board, where we figured it up, \$2 on one and \$1.25 on another.

Q. All right, let's start over again.

During the time you were doing business with American you were getting a \$2 discount on wallboard, weren't you?

A. That looks like it.

Q. And you were getting \$1.25 on lath, as a discount, weren't you?

A. According to that figure.

Q. And you were getting 10 per cent on plaster, weren't you?

A. Well, I don't have that.

Q. Don't you remember —

Mr. KNUFF (interposing). If your Honor pleases, the witness didn't testify that he got any discount at all on lath and plasterboard, but that he had some arrangement that he would be taken care of at a future time. Now Mr.

Bromley is asking him about a \$2 discount, and  
3113 the witness didn't testify that he ever had a \$2 discount.

Justice STEPHENS. Well, if the witness is informed as to his own business, he can so state. This is cross-examination. You understand, I assume, that you are only to answer questions truthfully, and according to your recol-



lection. If you didn't get any discounts, you are not required to say that you did.

The WITNESS. This is only a matter of figuring, we never got any discount on any of this that he is asking me about. It was written in there because we claimed it, but we never got it. That is not my writing.

By Mr. BROMLEY.

Q. It is not your writing?

A. No, sir.

Q. Didn't you tell us yesterday that you did business with American starting back in 1902?

A. Yes, sir.

Q. Isn't it a fact that for over twenty-five years you bought plaster from American at a discount of about ten per cent?

A. At a discount that permitted us to sell to the dealers, whatever it was. It changed with the market.

Q. Wasn't it about ten per cent?

A. I don't have that here.

3114 Q. I don't care whether you have got it here or not. Don't you know enough about your own business to remember about what discount you were getting from American?

A. It changed.

Q. Well, wasn't it around ten per cent?

A. Well, it was something that was satisfactory to us.

Q. Won't you tell us in figures, as to whether or not it was around ten per cent?

A. I don't believe I would hazard a guess, it goes back too far.

Justice STEPHENS. Mr. Spease, you are under an obligation to be just as frank in your answers to counsel on one side as to counsel for the other side. Of course if you cannot remember that, you may say so, but it seems extraordinary to the Court that you should not remember.

The WITNESS. Your Honor, I am trying to be as truthful as I can. Maybe you don't quite understand. Over a term of years the market was up and down, and we didn't get quite as much at times.

Justice STEPHENS. Counsel is not trying to bind you to the penny, he wants to know approximately what the discount is, if you remember. If you don't, you must feel thoroughly free to say so.

The WITNESS. I am truthful when I say that. We had

a profit on it. It was ten per cent sometimes and sometimes it was fifteen.

3115 By Mr. BROMLEY.

Q. It was never more than fifteen, was it?

A. No, and many times it was less than ten, based on freight rates.

Q. Isn't it a fact, Mr. Spease, that most of the time the discount that you got on plaster from American was ten per cent or less?

A. I would think so.

Q. Now you got that discount on plaster from American from 1902 until 1933, didn't you?

A. I think so.

Q. And you got your discount on board of about \$2, on wallboard, and \$1.25 on lath, from the time American commenced to make board until 1930, didn't you?

A. Yes, it seems we did.

Q. You told us yesterday, at page 3288 of the record, in answer to the question beginning at line 3, as follows:

"Q. Since when haven't you been a jobber of plaster?

"A. Since 1933, March 31st", and so forth.

Do you remember giving that answer?

A. Yes, sir, that is what I said.

Q. Now that answer was entirely and completely false, wasn't it?

A. No.

3116 Q. It wasn't? Didn't you go on jobbing plaster for years after March 31, 1933?

A. Yes; that must be a mistake if I made that statement.

Q. Was it a mistake, Mr. Spease?

A. It is bound to be, I wouldn't tell you anything else.

Q. Do you mean to tell me that you didn't realize, when you told this Court yesterday under oath that you hadn't been a jobber of plaster since 1933, March 31st, when the fact was that you went on jobbing plaster for years after 1933—do you mean to tell us now that you had overlooked that?

A. You say I said it. Read my answer, please.

Q. (Reading.) "A. Since 1933, March 31st, the last car of plaster that American Gypsum had for us they held for ten days, it was 20 tons, to be shipped to Silas McQuain, at Elkins, West Virginia."

A. They refused to sell us any plaster as a jobber after

that time, but only as a dealer.

Q. Well, Mr. Spease —

A. (Interposing.) That was what I had intended to say.

Q. But you didn't intend to create the impression that you went out of the jobbing business in plaster, is that it?

A. Well, we were covering about six or seven States, and we are not doing it now, we don't have any of the dealers we had then.

Q. Did you go out of the jobbing business in plaster on March 31, 1933, or didn't you?

3117 A. Practically so, we lost all our dealers.

Q. Do you mean to say that you couldn't buy plaster at a discount after March 31, 1933?

A. Not to call on our trade at a profit.

Q. Do you mean, then, that you couldn't get a discount after March 31, 1933, on plaster, is that it?

A. We couldn't get a price that justified our traveling men, and we had to stop.

Q. Well, could you get a discount?

A. We couldn't get a thing from the American Gypsum Company.

Q. You know I am not limiting the question to American, don't you?

A. You mean the field, everybody?

Q. Didn't you buy plaster after March 31, 1933, at a discount, and resell it at a profit?

A. In a few instances, we did, but not to call on our trade. Our trade is all gone. We covered parts of seven States. That is all gone, and our dealers are all gone.

Q. Couldn't you buy plaster after March 31, 1933, at a discount?

A. Not to sell to dealers, no, sir.

Q. I don't know what you mean by "not to sell to dealers". My question simply is—couldn't you buy plaster after March 31, 1933, at a discount?

3118 A. Not to sell to our dealers, we lost them all. We were covering sections of seven different States, and those dealers have all been taken away from us, we lost all that business and had to stop.

Q. Won't you answer my question? Couldn't you, after March 31, 1933, buy plaster at a discount?

A. We bought it at a discount in a few instances, but not profitably to our business.

Q. What discount did you get?

A. Well, as you say ten per cent, around ten per cent.

Q. Now you understand I am referring to the period of time after March 31, 1933, don't you?

A. Yes, sir.

Q. After that time you continued to buy plaster at the same discount that you had before, is that what you say?

A. In a very small and limited way, so we could not call on our dealers and we lost all our trade.

Q. From whom did you buy it at the ten per cent discount?

A. We have bought it from Ebsary.

Q. And what discount would you get from Ebsary?

A. It is around ten per cent.

Q. Who else did you buy it from after March 31, 1933, at a discount, now?

A. After 1933?

3119 Q. Yes, that is what I am talking about, after March 31, 1933.

A. We bought some from Oakfield until they sold out. That was in 1938, I believe, wasn't it?

Q. Well now, you have known all the time that I have been asking you these questions, that in 1933 you got a written contract with Oakfield which gave you a fifteen per cent discount on plaster. You have known that all the time, haven't you?

A. Well, it would seem that I did, but you kind of twisted me up. No, I didn't, I do now.

Q. Do you mean to say that until this minute you didn't remember that you got a written five-year contract in 1933 from Oakfield with a fifteen per cent discount?

A. I will say that for the moment I didn't think of Oakfield and that contract.

Mr. BROMLEY. I move to strike out the witness' answers in which he said he was not able to buy plaster in order to sell to his dealer trade, as not responsive.

Justice STEPHENS. They may go out as not responsive. You must answer the questions which you are asked, if you can. You have been answering two questions at once; that is what you have been doing, without realizing it. You have been answering the question whether or not you could buy at a discount, and also whether or not you could do so and sell profitably. You are being asked on only one  
3120 subject, and that is as to whether or not you could buy at a discount.

The WITNESS. Your Honor, I was a little confused.

Justice STEPHENS. Very well.



We will take a recess at this time until two o'clock in order to afford a little more time for a study of these authorities.

(Thereupon, at 12:15 o'clock p.m., a recess was taken to 2:00 o'clock p.m. of the same day.)

3121

## AFTERNOON SESSION

(The trial was resumed at 2:00 o'clock p.m.)

Justice STEPHENS. Do you wish to proceed with the cross-examination, Mr. Bromley, or be heard upon authorities at the present time, or do you wish to postpone the authorities until after the cross-examination?

Mr. BROMLEY. I would just as soon go ahead with the cross-examination if that meets with your Honor's approval.

Justice STEPHENS. That is all right, go ahead.

Whereupon, J. R. SPEASE, the witness on the stand at the taking of the recess, resumed the stand and was examined and testified further as follows:

## CROSS-EXAMINATION by Mr. BROMLEY.

Q. Well, you now remember that in 1933 you got a written contract for five years, at least, from Oakfield, don't you?

A. Yes, sir.

Q. That is Exhibit 357.

A. May I see it, please?

(Thereupon, Exhibit No. 357 for identification was handed to the witness.)

Q. By virtue of that contract, you were enabled to continue in business as a jobber of plaster, were you not?

A. Yes, sir.

3122 Q. And it provided that Oakfield would sell you all the plaster that you wanted to buy, put up in your bags, with your trade-mark on them, giving you \$1 a sack allowance, and selling you at the dealer market price less a fifteen per cent discount from the net price, didn't it?

A. Did you say \$1 a sack, or \$1 a ton?

Q. \$1 a ton allowance for sacks, excuse me.

With that amendment, the terms outlined in my question are correct, aren't they?

A. Yes, sir.

Q. You got a further concession in that contract, did you

not, by way of a very liberal provision for the absorption of freight on the part of Oakfield, your supplier?

A. I don't think so.

Q. Don't you remember this contract, Mr. Spease?

A. Yes, I do.

Q. Have you read it recently?

A. Yes, sir.

Q. Don't you remember that at the bottom of page 1, under the heading Freight Absorption —

A. (Interposing.) Oh, yes, yes, sir.

Q. And the net effect of that provision was that Oakfield not only agreed to give you a fifteen per cent discount, but agreed to make you a further allowance up to somewhere around \$1.50 or more a ton if the freight involved was double that amount?

3123 A. Yes, sir.

Q. Now that was a very favorable arrangement for you, wasn't it?

A. It helped.

Q. Didn't it help in this respect, that it enabled you to sell over a wide territory because Oakfield agreed to pay one-half of the excess freight which was involved in your selling a customer at some considerable distance from your place of business?

A. No, we were handicapped by not having mixed cars to sell at a profit.

Q. But so far as plaster was concerned, Oakfield agreed that they would absorb half the freight down to a net price to them of \$5.50 a ton, didn't they?

A. Yes, sir.

Q. And they agreed that where it was necessary to absorb freight in excess of \$1 a ton, they would bear one-half of that excess in every instance, didn't they?

A. That is what it says.

Q. And that is what they did?

A. They did what they said, yes, sir.

Q. Now on top of that, you got the usual discount for prompt cash payment, did you not?

A. Yes, sir.

3124 Q. This contract also obligated Oakfield to sell you plasterboard, didn't it?

A. Only as a dealer.

Q. Well, first didn't it obligate Oakfield to sell you plasterboard?

A. Yes.

Q. And it fixed, on page 2, near the bottom, as the price

for wallboard, \$27 a thousand feet, didn't it?

A. Yes, sir.

Q. And it fixed the price for lath at \$15?

A. Yes.

Q. Per thousand square feet, didn't it?

A. Yes, sir.

Q. Now it also provided that those prices would be changed in accordance with general market conditions, is that right?

A. Yes, sir.

Q. And Oakfield thereafter furnished you all the board you wanted at the prevailing market prices, didn't it?

A. At the prevailing dealers' prices.

Q. Well, at the price of \$27 and \$15, as specified in the contract, unless the market changed that to some other figure, isn't that right?

A. Yes, sir.

Q. So that when you told the Court yesterday that you hadn't been a jobber of plaster since 1933, that 3125 wasn't right, was it?

A. That must have been an error, if I said it.

Q. Well, you had an interest, Mr. Spease, in making it appear that you did not job plaster after 1933, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Yesterday wasn't the first time during the course of this trial that you appeared in this courtroom, was it?

A. No, sir.

Q. You have been here several times, haven't you?

A. Yes, sir.

Q. And didn't you have your treble damage file with you yesterday, up there?

A. I don't understand the question.

Q. You don't know what the phrase "treble damages" means?

A. No, sir.

Q. You have got a lawyer, haven't you?

A. Not here, no, sir.

Q. Back home, haven't you?

A. Oh, yes, yes, at home.

Q. And you have a very great interest in seeing that the Government wins this suit, haven't you?

A. I am interested in continuing as a jobber of materials.

3126 Q. You are interested in seeing the Government win this suit, aren't you?

A. Well, if there isn't something done I have got to fold up and quit.

Q. You intend to bring an action for money damages against these defendants if the Government wins this suit, don't you?

A. I wouldn't say so, it is being considered.

Q. It has been considered by you and your lawyer, hasn't it?

A. Not by my lawyer, no, sir.

Q. It has been considered by you and your associates?

A. By myself individually.

Q. In fact, Mr. Spease, you are the man who started this whole Government prosecution, aren't you?

Mr. KNUFF. Wait a minute. If your Honor pleases, that is objected to as immaterial. We can definitely assure the Court that Mr. Spease didn't start this prosecution, and it isn't a prosecution.

Justice STEPHENS. Well, the examination is proper cross-examination. The word "prosecution" is intended, I assume, to mean prosecution of this proceeding.

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. And if the witness did urge the Department of Justice to commence this proceeding, I think counsel for the defendants is entitled to bring that  
3127 out as bearing upon the interest of the witness, and therefore upon the credibility of his testimony.

Mr. KNUFF. If Mr. Bromley will follow that question up by proof, if he is going to prove by some person that Mr. Spease instigated this prosecution, all right. But it is unfair to cast aspersions on Mr. Spease unless Mr. Bromley follows that up. He knows very well that Mr. Spease did not instigate this suit.

Justice STEPHENS. Now I think your remarks are not in order, Mr. Knuff. It is the commonest and most conventional sort of cross-examination to ask a witness whether or not he instigated or commenced or secured the prosecution of a suit. If he didn't all he has to do is to say so.

Mr. STEFFEN. All he can do is say that he complained to the Department. He has no power to instigate a suit.

Justice STEPHENS. You can bring that out on redirect examination. The objection is overruled.

Mr. BROMLEY. Read the question, please.



(Thereupon, the pending question was read by the reporter.)

The WITNESS. I deny the charge, no, sir.

By Mr. BROMLEY.

Q. Didn't you come down to the Department of Justice in 1939, or thereabouts, and complain?

3128 A. No, sir, I did not.

Q. Didn't you ever come to the Department of Justice and complain?

A. I have been there many times. The first time I was there I was subpoenaed to come, and I didn't know anything else to do but come.

Q. Didn't you come down here before you were subpoenaed?

A. No, sir.

Q. At no time?

A. No, sir.

Q. Didn't you cause someone to come here in your behalf before you were subpoenaed?

A. I did not.

Q. Didn't you go around the country seeking aid from people to complain to the Department of Justice about these defendants?

A. I did not, no, sir.

Q. Well, you appeared before the grand jury, didn't you?

A. Yes, sir, I was subpoenaed.

Q. And as a result, in part, of your testimony, your own brother-in-law was indicted, wasn't he?

Mr. STEFFEN. He can't ask that question as to what transpired before the grand jury. It is an utterly unfair and improper question.

Justice STEPHENS. I suppose that asks for a conclusion that this witness is hardly in a position to state,

3129 Mr. Bromley.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. Your own brother-in-law was indicted after your appearance before the grand jury, wasn't he?

A. Yes, sir.

Q. And you testified against him before the grand jury, did you not?

Mr. STEFFEN. I don't think he can ask this witness what he testified to before a grand jury.

Mr. BROMLEY. I withdraw the question.

By Mr. BROMLEY.

Q. The fact is that you hadn't spoken to your brother-in-law for ten years prior to the time he came down here, isn't that correct?

A. There has never been a time in my life that I haven't spoken to him and been friendly with him, and we are still friendly.

Q. Isn't it a fact that he doesn't speak to you?

A. It is not a fact. He speaks to me every time he sees me. If he would see me first, he would holler at me, and if I saw him first I would holler at him.

Q. Do you remember your appearance at the criminal trial?

A. Oh, yes.

Q. You saw him sitting in the courtroom, didn't you?

3130 A. Yes, sir.

Q. Did you speak to him?

A. I shook hands with him before he went in.

Q. Before who went in?

A. Before either one of us did. I met him on the street, he and I think Ralph Burley, I don't exactly recall, there were two or three, and Mr. Baker was there, I believe. I shook hands with all of them.

Q. Now, sir, you testified at page 3297 of the record, referring to a conversation with Mr. Black in 1930, that Mr. Black said, "that all jobbers of board and plaster have been eliminated, and that we would have to go, and that he was not permitted to sell us any more for resale to dealers."

Do you remember that?

A. Yes, sir, if that date is right, 1930.

Q. Your answer ends up with the words, "That was in 1930"—appearing on lines 19 and 20 of page 3297.

Now do you say now that in 1930 Mr. Black told you that he was not permitted to sell board or plaster to you on a jobber basis?

A. I said board in 1930, and it was in 1933 that he refused to sell me plaster, March 31st.

Q. So that this answer, to the extent that it hints that it includes plaster, again is incorrect, isn't it?

A. Well, that is the statement that you said I made. If it is against me, I made it, but I meant  
3131 and should have said that it was on March 31st,

1933, that he said he couldn't sell us plaster, and in 1930 he refused to sell us board at a discount.

Q. All right. So this answer on page 3297 should be corrected to state that all that Mr. Black said was that he couldn't sell you plasterboard at a discount any longer. That is right, isn't it?

A. Yes, sir.

Q. Now at page 3299, at the top of the page, at line 2, you were asked this question:

"Q. When did they stop shipping gypsum board to you?"

"A. I believe it was in 1933".

Now, you don't mean that either, do you?

A. Yes, in 1930 he said he would stop shipping us board for resale to dealers, but he continued to ship it, but not at a discount, until we had some 71 carloads shipped on which we never received any commission. Then in 1933 he refused to ship us —

Mr. BROMLEY. I move to strike that as not responsive.

Justice STEPHENS. Finish the answer.

The WITNESS. Then in 1933 he refused to ship us plaster or board either.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

3132 Justice STEPHENS. That may go out as not responsive. Just answer that question.

Mr. STEFFEN. Your Honor, that question calls for a very broad answer—"You didn't mean that"—and he made an explanation very carefully.

Justice STEPHENS. He didn't answer the question.

Mr. STEFFEN. When he says, "you didn't mean that," that calls for an explanation as to what he did mean.

Justice STEPHENS. Read the answer to the question.

(Thereupon, the answer was read by the reporter.)

Mr. BROMLEY. Now I am talking about 1933, and he hasn't come anywhere near answering that question. I will withdraw the question and phrase it this way.

Justice STEPHENS. Very well.

By Mr. BROMLEY.

Q. At page 3299, you were asked this question:

"Q. When did they stop shipping gypsum board to you?"

And you answered:

"A. I believe it was in 1933."

Now that is not true, is it?

A. Yes, I would say that it is.

Q. Isn't it the fact that American never stopped shipping board to you?

A. It is not a fact.

3133 Q. Isn't it the fact that American at all times was willing to sell and ship you all the gypsum board you wanted at the dealer's price?

A. From Arthur Black and Charlie Miller I gathered, on March 31, 1933, that they didn't want our business, and I never asked them for any business after that.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

Mr. BROMLEY. Now will you answer the question?

Justice STEPHENS. Read the question, please, to the witness. You understand, Mr. Spease, or you should understand, that counsel for the Government will be entitled to re-examine you on what will be called redirect examination, and bring out any explanations of your answers that they think are relevant in this case, subject to the rulings of the Court.

At the present stage of the examination it would save a great deal of time for all of us if you would just answer if you can the questions which are asked you.

Read the last question to the witness.

(Thereupon, the last question was read to the witness by the reporter.)

Justice STEPHENS. You can answer that "yes" or "no", can't you?

The WITNESS. I really don't know. I feel like saying "no", and yet any dealer can buy—who pays his bills—anything from anywhere. Without a good deal of

3134 explanation I don't know how to answer.

Justice STEPHENS. That question is a simple question, and as far as the explanation is concerned you can trust that to be brought out by the lawyers for the Government, don't worry about that.

The WITNESS. In that case, I would say "yes".

By Mr. BROMLEY.

Q. And it is the further fact, isn't it, that from 1930 to 1933 you bought all the board you wanted from American at the dealer price?

A. We didn't know it at the time.

Mr. BROMLEY. I move that that be stricken as not responsive.



Justice STEPHENS. It may go out.

○ By Mr. BROMLEY.

Q. Now will you answer the question?

A. We bought all the board we wanted at the dealer price, yes, sir.

Q. And you have before you a list of the footage of board that you bought from American between 1930 and 1933, and it adds up to nearly three-quarters of a million feet, doesn't it?

A. Yes, sir.

Q. Now do you still say, sir, that in 1933 American stopped shipping board to you?

3135 A. They shipped it as a dealer.

Mr. BROMLEY. I move to strike that answer out as not responsive.

Justice STEPHENS. It may go out.

Mr. BROMLEY. Will you answer the question?

Mr. STEFFEN. This is all irrelevant, your Honor, as to whether it was shipped or not. The question, to be material, has got to be a question of whether he was allowed to buy as a jobber. That is the issue here, and any question which is designed to trap the witness into an admission seems to be utterly out of place, and it seems to me that the witness should be entitled to explain.

The question that he is asking here, or the question concerning which he is asking here, Mr. Bromley does not state the full answer to. He just picks out the first few words. The answer is a broad answer. It says: "I believe it was in 1933. They sold us board, understand, at the dealer's price, but not so we could resell to dealers as we had been doing for years."

That is what he testified to; that is his whole answer, and I think he should be asked whether that is true or not.

Justice STEPHENS. Well, Mr. Steffen, we doubt whether we can properly prevent counsel on cross-examination from examining upon only a part of the answer. He did give a positive answer. He stated, "I believe it was in 3136 1933", in answer to your question, or Mr. Knuff's question, "When did they stop shipping gypsum board to you?"

Now, if on redirect examination you wish to read the entire answer to him and ask him if that would modify his statement, you may do that. But the questions go to the

correctness of the statement of the witness, and I think we cannot stop that examination. Overruled.

Mr. BROMLEY. May I have the question, please?

(Thereupon, the last question was read by the reporter.)

The WITNESS. I am confused, I don't know how to answer it. They would ship us all the board we wanted, but not so we could resell it.

By Mr. BROMLEY.

Q. Isn't it a fact that American didn't stop shipping board to you at all, but that you stopped buying board from them and went to another source of supply?

A. Yes, when we found out the fix we were in, we left them.

Mr. BROMLEY. I move to strike out everything but "Yes", as not responsive.

Justice STEPHENS. It may go out. Please, Mr. Spease, answer the questions.

The WITNESS. I will try to, Judge.

3137 Justice STEPHENS. Counsel are not trying to trick you or mix you up, but counsel on both sides of the case have an opportunity to ask the questions which are relevant to their theory of the case. Your lawyers, the lawyers for the Government, who called you here, will ask questions on redirect examination if they think your answers on cross-examination do not sufficiently and fully state the facts. But the defendants' counsel have the right to ask you particular questions.

If they can be answered without some other explanation, on a "yes" or "no" basis, you are expected to do so. There are some questions, of course, that cannot be answered "yes" or "no", but the last one could be.

The WITNESS. Your Honor, I am just a little confused.

Justice STEPHENS. Take your time, and be at ease, but pay attention to these questions and answer the questions. It will save a lot of time if you do, and you will get away on your vacation sooner.

By Mr. BROMLEY.

Q. Didn't you say a minute ago that in 1933 you concluded that Black and American didn't want your business any more, so you went over to Oakfield?

A. Yes, sir.

Q. And at the time you stopped buying board from American one reason was that you claimed they owed you \$1,700, wasn't it?

3138 A. Some good amount.

Q. And Mr. Black said, "We don't owe you anything and we won't pay you the \$1,700"—didn't he?

A. He said he couldn't pay it now.

Q. Well, he never did pay it, did he?

A. No, sir.

Q. Now you have got on that piece of paper before you the exact amount of the claim which you asserted against the American Gypsum Company on March 31, 1933, haven't you?

A. Yes, sir.

Q. What is that exact amount?

A. \$1701.42.

Q. And they have never paid it from that day to this, have they?

A. No, sir.

Q. Now referring to the second sentence in your answer at page 3299, to which Mr. Steffen has referred, you went on to say: "They sold us board, understand, at the dealer's price, but not so we could resell it to dealers as we had been doing for years."

Now in that sentence did you refer to the period prior to 1933 or after 1933?

A. That must have been the period between 1930 and 1933.

Q. Now you had been buying board from Oakfield, and plaster too, I guess, as far back as 1930, hadn't you?

3139 A. That is substantially correct.

Q. You told us yesterday or this morning that you had a conversation with Arthur Black in 1930, and you testified about that conversation. Isn't it a fact that all that Mr. Black said to you in 1930 was that American no longer could sell you patented plaster board at a discount?

A. Substantially, yes, sir.

Q. And when you talked in your direct testimony about United States Gypsum Company not permitting a discount, you weren't testifying as to what Mr. Black said, were you?

A. In part.

Q. Well, isn't it the fact that Mr. Black in this conversation in 1930 didn't mention United States Gypsum at all?

A. I just don't remember just how his remark was phrased at this time.

Q. Aren't you thinking of what you referred to this morning as common rumor or gossip that you had heard

around, and not referring to what Mr. Black told you at all?

A. No, it was common knowledge, yes, that went along with it. But I went to Mr. Black for my information on what we could do.

Q. I ask you if it isn't the fact that Mr. Black in that conversation never mentioned USG at all.

A. I am not so sure.

3140 Q. And isn't it the fact that all he said was, "American can no longer sell you the patented board at a discount"?

A. He said that plenty of times.

Q. Isn't that all he said, sir?

A. I don't know about that particular time, I just don't recall.

Q. Isn't that all he said at any time?

A. I am not sure.

Q. Well, you testified about this in the criminal case, didn't you?

A. Yes, sir.

Q. Your memory was probably better then than it is now, wasn't it?

A. It should have been.

Q. Do you remember what you said in the criminal case?

A. No, sir, I can't say that I do.

Q. Well, at page 2629 in that case you were asked this question:

"Q. What was it that Mr. Black told you in 1930 about selling board to you?

"A. I think he told me that he could not make us a discount, that we could sell board for resale to dealers in different States in different places".

Do you remember that?

A. Yes, sir.

3141 Q. Do you remember that you were asked this question and gave this answer on the same page:

"Q. Did you know in 1930 that the price at which Mr. Black of the American Gypsum Company, and the discounts at which he could sell, were fixed under a license agreement?

"A. Well, I could not get anything out of him about that. He told me he would not sell us and that settled it".

Do you remember that?

A. Yes, sir.

Q. That was true, wasn't it?



A. It was true if I said it.

Justice GARRETT, Are you reading, Mr. Bromley, from the testimony on the trial of the criminal case?

Mr. BROMLEY. Yes, your Honor.

Justice GARRETT. Thank you.

By Mr. BROMLEY.

Q. And do you remember that I asked you at page 2630 this question:

"Q. I understand that, Mr. Spease. All I want you to tell me, if it be the fact, is what Mr. Black told you, if he told you anything about a discount?

"A. No, I could not get anything out of him, he was very careful not to tell me anything."

Do you remember that?

A. It sounds familiar to me.

3142 Q. And that was true, wasn't it?

A. Yes, sir.

Q. And do you remember that just to make it certain I asked you this question:

"Q. And you did not know that the reason that he could not give you a discount was because the United States Gypsum Company on the 6th of August, 1930, had changed its price bulletin so as to eliminate the 10 per cent discount to jobbers?

"A. He did not tell me anything."

Do you remember that?

A. That is the answer?

Q. Yes.

A. Yes.

Q. Do you remember that?

A. Since you have read it I kind of think I do.

Q. That was true, wasn't it?

A. If I have said it as you have it, I thought it was true, yes, sir.

Q. And isn't it likewise true that Mr. Black told you that he would sell you board at the dealer price, and went on selling it to you as long as you wanted to buy it, which was for at least three years more?

A. Yes, but we were to have it made up to us some way, and we never got it. That is from 1930 to 1933.

3143 Q. But you paid the dealer price for all of the three-quarters of a million feet that you bought during the three years, didn't you?

A. From 1930 to 1933?

Q. Yes.

A. Yes, sir.

Q. And so far as plaster was concerned during that interval, Mr. Black went right on giving you the 10 per cent discount, or thereabouts, which he had given you for the twenty-eight years prior to 1933, isn't that a fact?

A. They never shipped us any after that, I don't know.

Q. What?

A. We didn't ask them to ship us, or they never shipped us any after that, so I hardly know how to answer that.

Q. Well, when you say they didn't ship you and that you didn't ask them to ship you, you are talking about 1933, aren't you?

A. Yes, sir.

Q. I am talking about 1930, and have been right along in these last few questions. Isn't it a fact that after 1930, when Mr. Black told you that he could not give you a discount on board, that he went right ahead and sold you plaster and gave you the usual and customary discount?

A. That is substantially right, yes, sir.

Q. Now, how many conversations do you say now there were with Mr. Black in the three-year period between 1930 and 1933?

A. Several, but I couldn't say how many.

Q. What is your best recollection as to the approximate number?

A. Well, it is only a guess, if you want me to hazard a guess, if that is permissible, I could do so.

Q. When you said six or eight or your direct examination, were you guessing?

A. Partially.

Q. Well, how many of the six or eight were a guess, and how many do you remember?

A. I met him twice in Cleveland, and a couple of times in Port Clinton, and once in Pittsburgh, I think.

Q. Now are those all the occasions that you can remember, five?

A. I just don't recall any others at this time.

Q. Now will you recite the five by dates, please?

A. Oh, I couldn't do that.

Q. You couldn't do that?

A. No, sir.

Q. All you could say is that they were between 1930 and 1933, is that right?

A. Yes, sir.

Q. Now you have testified about these conversations in the criminal case, haven't you?

3145 A. If you have the evidence there, I think that I did.

Q. Well, you have already seen that I have the evidence here—you know that, don't you?

A. Yes.

Q. Well, isn't it the fact that the subject of your conversation with Mr. Black at each and all of these five occasions was merely whether or not he would give you a discount on patented board?

A. We talked and discussed many subjects. We talked about plaster and board, and then back to plaster—I suppose we 'most always did.

Q. Isn't it a fact that your conversations with Black about which you testified on direct during this period were confined to your attempts to get Black to give you a discount on board?

A. Naturally.

Q. You were getting your discount on plaster all of this time, weren't you?

A. Yes, sir.

Q. So you didn't have any occasion to talk with him about that, did you?

A. Well, I thought I did.

Q. But he was giving you your discount all the time on plaster wasn't he?

A. Yes.

3146 Q. He never made any promise to take care of you on plaster, did he?

A. No, sir.

Q. Because he was giving you your discount on plaster, wasn't he?

A. Yes, sir.

Q. Do you remember that you told this Court at page 3311, near the top of the page, at line 5, referring to these conversations in this period, as follows:

"Q. Did he say why he couldn't help it?

"A. The U. S. Gypsum Company, Mr. Avery, wanted to do away with the jobbers.

"Q. Did he say that?

"A. Yes, sir.

"Q. Where did he say that, in Cleveland?

"A. I can't be sure, but I would say every time I ever saw him, but maybe not."

Do you remember that you testified to that?

A. Yes, I think I do.

Q. Now isn't it the fact that all Black ever said to you at any of these conversations was that under his license with USG his company had to sell board to you at a fixed price, and that fixed price did not include a discount?

A. Well, substantially that is correct, either one of them.

3147 Q. Well, when you say that you meant that, you mean that what you say now is what you intended to say on page 3311, is that right?

A. There has been so much said on both sides and so many names quoted that I don't believe I can tell you.

Q. You don't really remember what Mr. Black said, if anything, do you?

A. Oh, yes, I do.

Q. Well, isn't it the fact that all he ever said to you was that under American's license agreement, American had to sell patented board at a price which was fixed by USG, and that price did not include a discount?

A. I don't think he ever went into that much detail about it.

Q. Did he just say he couldn't give you, any longer, a discount—would that be a fair statement?

A. Of course, that is what he meant.

Q. Well, isn't that what he said?

A. I wouldn't say so.

Q. Wasn't there another reason for the fact that you talked with Mr. Black at least five times during this period of time between 1930 and 1933?

A. Nothing, only business. I have talked to him on many subjects that would come under the head of gossip, when we would get together.

3148 Q. And wasn't it an important reason that you were constantly pressing him to pay the money that you said American owed you?

A. No, sir, I don't think we ever pressed it very much because we thought we were going to get it eventually.

Q. When did you start pressing the claim?

A. Too late. At that time they were taken over by Celotex.

Q. And you knew, during this period from 1930 to 1933 that American was losing money, didn't you?

A. I can't say that I did.

Q. Don't you remember that Charlie Miller was put in there during this period in order to make a study to find out why it was that American was operating at a loss?



A. I didn't understand so.

Q. You didn't know that Mr. Miller had testified here that that was the fact, did you?

A. No, I don't think that I did.

Q. During this time Charlie Miller and Arthur Black and the officials of American knew that you were dealing with the Oakfield Company, didn't they?

A. By rumor and hearsay I would think so, yes.

Q. And the fact is that as a result of all of these factors, you took your business away from American in February, 1933, isn't that so?

3149 A. No, it was after March 31, 1933.

Q. No, before March 31, 1933?

A. In order to reach out in the East where we had a more favorable freight rate, we bought some plaster from the Universal Gypsum Company and the Oakfield Gypsum Company some years before.

Q. Didn't you make your arrangement with Oakfield which finally eventuated in a long-term contract, prior to March 31, 1933?

A. In 1930 I think we bought our first plaster, that is in the testimony.

Q. I am talking about the written contract, Exhibit 357, which is dated December 17, 1933, on the first page thereof, and I am asking you whether it isn't the fact that you made the arrangements which are there expressed in writing with Oakfield, prior to March 31, 1933.

A. I don't recall the date. If it is there in writing, we did.

Q. You don't recall it now?

A. Not the exact date.

Q. Have you got the contract there?

A. Yes.

Q. What does it say in the very opening paragraph, Mr. Spease?

A. Do you refer to the plaster contract?

3150 Q. The contract covering plaster and board and Keene's Cement and white goods, dated December 17, 1933. Now look at the first paragraph and tell me whether that doesn't refresh your recollection that you made your arrangements with Eldred and Hansen as early as February, 1933?

A. That is what he states, yes.

Q. That is what he states—what do you mean by that?

A. Confirming our conversation.

Q. You signed the contract, didn't you?

A. Yes, sir.

Q. And when it says, "confirming our recent conversation with regard to continuing our sales agreement with you which has been in effect since February 14, 1933", that was right, wasn't it?

A. Yes, sir.

Q. You testified at page 3320 that in 1930 you had a conversation with Mr. Baker. At the bottom of page 3319 it shows that you were talking about the Thursday after April 7, 1930, and you were asked this question and gave this answer beginning at line 10 of page 3320:

"Q. Will you relate to the Court, please, that conversation?

"A. Mr. Baker and I discussed several matters first, and I brought up the matter of them packing plaster in our bags and selling us the board at a jobber's price so we could continue to call on the trade. He laughed and 3151 said, 'Spease, you know as much about it as I do.

Avery rules that we can't do it, and we can't do it. You might as well go home and forget it, you are going to have to do something else.'"

Do you remember that?

A. Yes, sir.

Q. Now isn't it the fact, Mr. Spease, that that conversation you had with Mr. Baker had only to do with the subject-matter of patented gypsum board?

A. Well, it was board and plaster and all these other products.

Q. I ask you whether or not it isn't the fact that the only thing that you and Baker talked about in that conversation in April, 1930, was patented board.

A. No, we talked about the whole line.

Q. Do you say now to this Court that in April, 1930, Mr. Baker told you that Avery had ruled that he couldn't give you a discount on plaster?

A. I just forget how it was worded.

Q. Well, you remember now, don't you, Mr. Spease, that for three years after this conversation the American Gypsum Company gave you a discount on plaster?

A. That is true.

Q. And you know that the American Gypsum Company was a licensee, just like National, their position was the same with respect to USG, don't you?

3152 A. That didn't keep me from trying to buy it.

Mr. BROMLEY. I move that the answer be stricken as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

A. Please state the question.

Justice STEPHENS. Read the question, Mr. Reporter.

(Thereupon, the question indicated was read by the reporter.)

The WITNESS. Your Honor, I can't answer that without an explanation.

Mr. BROMLEY. I will withdraw it.

By Mr. BROMLEY.

Q. All I am trying to get out of you, sir, is this. Don't you realize that to say the least you were mistaken when you testified at page 3320 that Baker told you that Avery had ruled that National couldn't give you a discount on plaster?

A. No, sir, I don't think so.

Q. Well, isn't it a fact that American went right ahead for three years after this conversation, giving you a discount on plaster?

A. Until 1933?

Q. Yes.

3153 A. Yes, sir.

Q. Now do you know of any reason why, if American could give you a discount on plaster, National couldn't, so far as USG was concerned?

A. Well, I can give you my thoughts. I suppose they were nearly organized and ready to do what they wanted to do to eliminate us.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. What was the answer?

(Thereupon, the last answer was read by the reporter.)

Justice STEPHENS. The answer seems meaningless to the Court, I don't understand it. It may go out. Ask the question again, Mr. Bromley.

By Mr. BROMLEY.

Q. Well, isn't it the fact that all that Baker said to you was that he couldn't give you a discount on board?

A. No, it isn't. All I was interested in was the whole line.

Q. Well now, you remember pretty clearly, do you, that Mr. Baker said what you stated on page 3320, "Avery rules that we can't do it, and we can't do it"?

A. Yes, sir, if I said it.

Q. You haven't just injected that in this case because you want the Government to win, have you?

A. I can't answer that without an explanation.

3154. Q. Well, you didn't say anything about this when you described the conversation with Baker at the criminal trial, did you?

A. I don't recall at the moment.

Q. Don't you recall that you never mentioned a thing about USG or Avery when you were describing, before the criminal jury, what Baker said to you in April, 1930?

A. It is possible.

Q. And don't you recollect that you there said that Baker's reply covered gypsum board?

A. It is bound to have covered the whole line.

Q. Don't you remember that you limited it to gypsum board before the criminal jury?

A. I just don't recall.

Q. Well, your recollection was better back in 1941 than it is now, wouldn't you say?

A. It should be.

Q. You had a very pleasant talk with Baker, didn't you?

A. Oh, yes, yes, sir.

Q. You were very friendly with him?

A. Yes, sir.

Q. You had known him for many years?

A. Yes, sir.

Q. Now when did it first occur to you that Mr. Baker, in his conversation, mentioned Avery's name?

3155 A. I don't recall.

Q. Did you have a talk with Mr. Knuff or Mr. Steffen about it before you took the stand?

A. Yes, sir, I have talked with them since I came here this time.

Q. And is that when it first occurred to you that Baker mentioned Avery's name?

A. No, sir.

Justice STEPHENS. We will take a recess of five minutes.

(Thereupon, a five-minute recess was taken, after which the trial was resumed.)

3156 Justice STEPHENS. Proceed.



By Mr. BROMLEY.

Q. Isn't it the fact that you didn't want to do business with National on any basis unless National would give you a discount on board?

A. That is substantially right. It would be of no account to us.

Q. Now this conversation in which you say Mr. Baker said that Mr. Avery had ruled that National couldn't sell you except at dealer's prices was in April, 1930, wasn't it?

A. I just made the one trip there. Is that the date?

Q. You said it was the Thursday after April 7, 1930. Don't you know that the USG change in the license bulletin which eliminated the jobber discount did not come out until sometime in August, 1930?

A. I can't recall that.

Q. In April, 1930, any licensee would have been free to give you a 15 per cent discount on patented board, did you know that —

Mr. STEFFEN (interposing). I don't see, Your Honor, how the witness could possibly know what the bulletin says.

Justice STEPHENS. If he doesn't know, he can say so.

Did you know or didn't you?

The WITNESS. No, sir, I didn't know.

3157

By Mr. BROMLEY.

Q. Nobody ever told you that it was the bulletin that leveled off the price so that the jobber's price became the dealer's price, as far as the licensees' sales were concerned?

A. I never understood it that way.

Q. Nobody ever told you that?

A. No, sir.

Q. Now at this time in April, 1930, you were getting a discount on board from American, weren't you?

A. No, sir, we weren't.

Q. Well, you were thinking way ahead of me when you looked at that schedule, weren't you?

A. No, sir.

Q. What did you look at the schedule for?

A. I looked at those shipped cars, I supposed I had a right to. I had these 70 cars here before me to see what the date was.

Q. You wanted to see when it was that your claim for a \$1700 commission started, didn't you?

A. Yes, sir.

Q. And you looked at the list and you saw that it didn't start until August, 1930, didn't you?

A. I didn't look at the month —

Q. (Interposing.) Well, look at it now.

3158 A. August, 1930, yes.

Q. That means that you got your commission from American up until August, 1930, doesn't it, on board?

A. I would think so.

Q. All right. So that in April, 1930, when you say that Baker told you that Avery ruled that you couldn't get a commission, you were actually getting your commission on patented board from American, weren't you?

A. Yes, but we were supposed to know that it was soon all over.

Mr. BROMLEY. I move to strike out that answer as not responsive.

Justice STEPHENS. It may go out except for the word "Yes", which I think was the first word in the answer.

Justice JACKSON. Do you mean the word "commission" to mean "discount"?

Mr. BROMLEY. Yes, sir, excuse me.

Justice STEPHENS. You understood that, did you not, Mr. Spease, that when Mr. Bromley was using the word "commission" he meant "discount"?

The WITNESS. Yes, sir.

Justice STEPHENS. If you don't understand any question, you are entitled to say so, and take your time in answering it.

The WITNESS. Thank you.

3159 By Mr. BROMLEY.

Q. Now, Mr. Baker never refused to sell you board at the dealer's price, did he?

A. I don't think so.

Q. And on the criminal trial, isn't it the fact that when you testified to this conversation with Mr. Baker, you placed it just as occurring sometime in 1930?

A. I really don't recall.

Q. Well, at page 2632, I asked you this question:

"Did you go to any other manufacturer except American in 1930 to see if you could get a discount?"

"A. Did I say that I went to see the National?"

"Q. I believe you did, yes, sir. Any other than National, then?"

"A. No, I do not recall that I did. I believe Mr. Baker told me I might as well go home and forget it, and I kind of stopped after he and Arthur Black, Mr. Eldred and Mr. Hansen, let me down, refused me."

Do you remember that you gave that testimony?

A. It sounds familiar.

Q. And do you remember that in describing your conversation with Mr. Baker, I asked you this question, at page 2633, line 4:

3160 "Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as between dealers and jobbers so that the only price that he could give you was the dealer's price?"

"A. Well, I think I made that statement. He said I might as well go home and forget it, we could not do business any more."

Do you remember that?

A. It sounds familiar, yes, sir.

Q. Now isn't it the fact that all that Baker ever said to you at any time was that after August, 1930, he could not give you a discount on patented board?

A. I can't answer that question without a little explanation.

Justice STEPHENS. Make your explanation.

The WITNESS. We sat there and talked, we knew each other pretty well, and he looked at me and said, "Spease, you know Avery has ruled you got to quit, you can't job plaster and board, and you might as well go home and forget it." We chatted a little while, and I left him. That was in his office, the only trip I ever made to see him. He knew that I knew, or he thought that he knew that I ought to know I couldn't buy plaster and board at a discount.

Mr. BROMLEY. I move to strike out that answer as not responsive, and as certainly no explanation.

Mr. STEFFEN. We ask that it be retained as an explanation. He asked for an explanation.

3161 Justice STEPHENS. Read the question Mr. Bromley asked which the witness said he couldn't answer without an explanation.

(The question was read by the reporter.)

Mr. BROMLEY. He can answer that yes or no.

Justice STEPHENS. Do you wish to be heard further?

Mr. STEFFEN. I wish to say simply that although it is possible for a person to answer yes or no, there is no regulation that requires him to do so, and if he asks for permis-

sion to make a fuller answer, that answer should go in if he is granted permission; and in the interests of getting at the truth of the matter, I think it ought to be encouraged for a witness to state fully what he has in mind. It saves a lot of time.

Justice STEPHENS. Well, counsel on both sides of the case are entitled to have the exact question which they ask answered, if the witness can in fairness to himself and truthfully answer the question which has been asked.

Now the Court, in a desire to be fair to the witness, and to be sure that the witness was not confused, gave the witness an opportunity to explain his answer to a question which could have been answered yes or no truthfully, but the explanation was not an explanation of the answer, it was a volunteering of additional material. You may wish to bring out, possibly, on re-direct-examination, something as to that. I think we do get at the truth better if  
3162 we confine the answers to the questions, where they can be answered categorically.

The answer is stricken out.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter as follows:

"Q. Now isn't it the fact that all that Baker ever said to you at any time was that after August, 1930, he could not give you a discount on patented board?"

Justice STEPHENS. There are some questions, Mr. Spease, that can't be answered fairly yes or no. The commonest jocular illustration of that is if I asked you if you have stopped beating your child, you couldn't answer that fairly yes or no, because it would assume you had been beating your child and probably you hadn't. But this kind of a question can be answered yes or no. It is a clear question. If the answer is yes, you can say so; and if the answer is no, you can say so, clearly within the truth.

Read that again. If it is not a fact, all you have got to do is say "no".

Read the question.

(The question was read by the reporter.)

The WITNESS. Your Honor, I can't answer that —

Justice JACKSON (interposing). Why can't you? Did he talk to you about that, or something else —

3163 The WITNESS (interposing). I wouldn't be interested in buying the board unless I could get the plaster and the whole line at a discount.

Justice STEPHENS. All you are being asked is what you



talked about. Did you talk about that only, or did you talk about the board and something else?

The WITNESS. The board and the plaster, everything coupled together.

Justice JACKSON. What is your answer, "No."?

Justice STEPHENS. Read the question again.

Mr. Spease, you are an intelligent man, you can see that the question can be answered yes or no. If you can't truthfully answer it yes, all you have got to say is no.

Read the question again to the witness.

(The question was read by the reporter.)

The WITNESS. No, that wasn't all.

By Mr. BROMLEY.

Q. Now at no time in the criminal trial did you ever mention that Baker said anything about Avery, isn't that right?

A. I don't recall.

Q. You don't recall?

A. No, sir.

Q. Do you recall that at the criminal trial you were asked this question and gave this answer:

3164 "Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as between dealers and jobbers so that the only price that he could give you was the dealer's price?

"A. Well, I think I made that statement."

A. If it is in there that way, yes, sir.

Q. That was the truth, wasn't it?

A. Read that again, please, sir.

Q. (Reading.):

"Q. And didn't Mr. Baker explain to you that the licensor, by a price bulletin, had leveled off the price as between dealers and jobbers so that the only price that he could give you was the dealer's price?

"A. Well, I think I made that statement."

Mr. STEFFEN. What is the full answer?

Mr. BROMLEY. "He said I might as well go home and forget it, we could not do business any more."

The WITNESS. I remember that.

By Mr. BROMLEY.

Q. That is the truth, isn't it?

A. Yes, sir.

Q. Now what are these two stores that you talked about

in your direct-examination that are operated by the Fairmont Company?

A. The two stores we had at Fairmont?

3165 Q. I don't know—what are they?

A. Hardware stores, builders' supplies, electrical appliances, and so forth.

Q. Those are retail stores; are they?

A. Yes, sir.

Q. Did you sell board and plaster and lime and cement at retail out of those stores?

A. Yes, sir, some.

Q. So that the Fairmont's business, in so far as those stores are concerned, was that of a dealer, wasn't it?

A. Yes, sir.

Q. Are both those stores in Fairmont, West Virginia?

A. Yes, sir.

Q. Now when you sell board as a dealer, you sell it above the dealer price, don't you?

A. Those are retail stores. Anybody that comes in there pays the retail price for anything and everything that we sell. Our dealers try to buy things through the store, and we won't sell it to them.

Mr. BROMLEY. I move to strike that out as not responsive. Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

Justice STEPHENS. Read the question.

3166 (The question was read by the reporter.)

The WITNESS. Yes, sir.

Justice STEPHENS. You see how much you would help us, Mr. Spease, if you would just listen to those questions and answer them directly. If further explanation of your answers is needed, counsel for the other side have an opportunity to examine you.

The WITNESS. I beg your pardon, sir, but I am doing the best I can.

Justice STEPHENS. Thank you, that is all any of us can do.

By Mr. BROMLEY.

Q. In addition to your business as a dealer, the Fairmont Company has a mixing plant down in Fairmont, West Virginia, hasn't it?

A. Not now, no, sir.

Q. Well, it did have?

A. Yes, sir.

Q. During what period of time?

A. Up until some few years back.

Q. Well, beginning when?

A. 1900.

Q. And lasting until when?

A. Oh, probably 15 or 20 years ago.

Q. How long?

3167 A. Probably 15 or 20 years ago. We had one there for 20 or 25 years.

Q. Now at that plant, you manufactured sanded plaster, didn't you?

A. Yes, sir.

Q. And you sold that at retail?

A. Yes, sir, and wholesale.

Q. Oh, were you a wholesale distributor, too?

A. Yes, sir.

Q. So that it was a part of your business to buy board at the dealer price and charge a mark-up and resell the board at a price higher than the dealer price, wasn't it?

A. In the retail end, yes, sir.

Q. And you could get that because a customer was willing to pay a mark-up on the dealer price for the service which you rendered him through the facilities of your two stores, isn't that right?

A. That would help, yes, sir.

Q. It would help whom?

A. It helps both ways. It helps him and it helps us to get more business. As I say, we sell nothing out of the stores only at retail.

Q. But when you sell the board at retail, you get a price that is higher than the dealer price, and that difference is called a mark-up, isn't it?

3168 A. Yes, sir.

Q. Now as a wholesale distributor, you sell to other people like yourself, that is, dealers, don't you?

A. Yes, sir.

Q. And when you sell a dealer a carload of plaster, you sell him at the prevailing dealer price, don't you?

A. Yes, sir.

Q. Doesn't it help you, to sell plaster to a dealer, to be able to furnish board to that dealer in a mixed carload?

A. Yes, sir, everything helps.

Q. So that it would be good business for you to be able

to furnish your dealer customers mixed cars of board and plaster, even though you did have to pay the dealer price for the board, wouldn't it?

A. No, sir, it wouldn't.

Q. You would make your money from your plaster, wouldn't you?

A. Not and keep men on the road, nowadays, you wouldn't.

Q. But you would make 15 percent off your plaster, wouldn't you?

A. Yes, sir.

Q. And if you were able to furnish board, you would be able to get more plaster business, wouldn't you?

3169 A. Yes, sir.

Q. Now there are plenty of people in business today who buy board at the dealer price and resell it to people at a mark-up, aren't there?

A. Yes, sir.

Q. They are jobbers, aren't they?

A. No.

Q. Well, do you draw a distinction between a man who makes his profit on resale by discount, and a mark-up?

A. Unless you can get profit enough from your carload to pay you, you might as well quit. Nearly every car is a mixed car with something else in it besides plaster. Consequently, if you had a profit on the plaster, or a profit on the board and no profit on the plaster, you couldn't afford to sell it and call on dealer trade.

Mr. BROMLEY. I move to strike the answer as not responsive.

Mr. STEFFEN. I think it is highly responsive. In his reference to dealer trade, it indicates his idea of a jobber, and the jobber business.

Justice STEPHENS. The question was whether or not he drew a distinction between one who sold at a discount and one who sold at a mark-up, and whether he did draw such a distinction can be answered yes or no.

If you wish to bring out the reasons why he drew or did not draw the distinction in mind, on re-direct-examination, you may have the opportunity to do that.

3170

The answer must go out as not responsive.

By Mr. BROMLEY.

Q. Will you answer the question, please?

Justice STEPHENS. Do you understand the question? Do



you draw a distinction between a dealer who sells at a mark-up and a dealer who buys at a discount?

The WITNESS. Yes, sir, I do.

Justice STEPHENS. Perhaps you had better rephrase the question yourself, Mr. Bromley.

By Mr. BROMLEY.

Q. Now you call a man who buys at a discount and sells at the dealer price, a jobber, do you?

A. The man that buys at a discount and sells to the dealer?

Q. Yes.

A. Yes, sir.

Q. But you do not call a man a jobber who buys at the dealer price and sells at a mark-up, is that it?

A. No, that would be retail business, that is what all dealers sell at.

Q. Now suppose the sale in the second hypothesis were to another dealer, would the seller be a jobber or wouldn't he?

3171. The WITNESS. Your Honor, I can't answer that without a little explanation.

Justice STEPHENS. That question may be answered yes or no; but if you think that yes or no answer doesn't adequately give your reason, you may state your explanation, subject to a motion to strike if it is not in the nature of an explanation. What you are being asked, as the Court understands it, is whether or not you would call a man who buys at the dealer price and sells at a mark-up to another dealer, a jobber. Can't you tell us whether or not you would call such a person a jobber?

The WITNESS. No, he is not a jobber. That is just accommodation.

By Mr. BROMLEY.

Q. He is not a jobber, that is accommodation?

A. Yes, sir, there is no dealer that sells to a dealer at a mark-up, only in extreme cases.

Q. When he does, what do you call him?

A. He is still whatever he is.

Q. He is a jobber, isn't he?

A. I don't know how to answer that unless I would say that the dealer that bought it was a darned fool, because he could go someplace else and buy as a dealer. We don't have any cases like that.

Q. You have never heard of a case where a dealer sold at a mark-up —

3172 A. (Interposing.) To a dealer?

Q. (Continuing.) —where a jobber sold at a mark-up to a dealer?

A. I beg your pardon, I thought you said a dealer to a dealer.

Q. No, a jobber sold at a mark-up over the dealer price to the dealer. You never heard of such a case?

A. Oh, there have been some of them, yes, sir. Nowadays everyone is posted on the market, you can't do that and get away with it.

Q. When was it that that was done?

A. It seems to me everybody knows the prices and always has a lower one than you can quote.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

A. I can't answer it.

Q. You can't answer it?

A. I don't believe I can.

Q. Now isn't it a fact that a jobber merely does what a manufacturer with a sales department does?

A. That is part of it only.

3173 Q. And you said on your direct-examination that you thought your jobber organization could do that work better than a manufacturer?

A. Yes, sir.

Q. And you said that was because you were able to see the customers more frequently than a big manufacturer was able to, is that right?

A. That is one reason, yes, sir.

Q. Now how many salesmen did you have, the Fairmont Company have, covering the five states that you mentioned, during the period from 1930 to 1940?

A. I don't think we had more than one.

Q. And, of course, you know that during that period the United States Gypsum Company, for that territory, averaged 25 to 30 salesmen, don't you?

A. I didn't think they did.

Q. How many did you think they had?

A. Well, I knew they had a man in West Virginia.

Q. A man in Washington?

A. They always did have a man in Washington, I suppose so, yes, sir.

Q. A man in Tennessee?

A. I would think so, yes, sir, in every state they  
3174 had a man, as far as I know.

Q. Didn't you know as a matter of fact that they had a sales office in every one of those states, with an average of four to five salesmen out of each office, during this entire period?

A. I can't say that I did, I haven't followed that part of it.

Q. Don't you know that the other companies, like National, had probably, during the same 10-year period, another 25 or 30 salesmen covering that 5-state territory of yours?

A. Yes, they all had men.

Q. You told us that you jobbed board and plaster for American since 1902. Now so far as board is concerned, that is quite incorrect, isn't it?

A. Yes, sir. I should have said from the time they started making board.

Q. That was in about 1920, wasn't it?

A. I can't say.

Q. Don't you remember that it was about 1920?

A. That is substantially correct.

Q. As a jobber, getting a discount, you sold many other jobbers, didn't you?

A. No, sir, we didn't.

Q. Do you mean to say that as a jobber, you wouldn't sell another jobber and split your commis-  
3175 sion with him?

A. No, sir, we wouldn't do that.

Q. That would be bad business, wouldn't it?

A. Yes, sir.

Q. This Oakfield Company that you talked about, of which Messrs. Eldred and Hansen were officers, they didn't manufacture gypsum board, did they?

A. No, sir.

Q. They bought the gypsum board from manufacturers, and were given a discount of 15 percent, weren't they?

A. Yes, sir.

Q. So far as board was concerned, this Oakfield Company was a jobber, wasn't it?

A. I would think so.

Q. Now you said you went to see Mr. Hansen and had a

talk with Mr. Hansen. Do you remember that?

A. Yes, sir.

Q. And Mr. Hansen was an officer of the Oakfield Company, wasn't he?

A. Yes, sir.

Q. Now isn't it a fact, Mr. Spease, that all Mr. Hansen said to you about your request that you buy board from him, was that he would not split his discount with you, but would charge you the dealer price?

A. He said that, substantially, and a good deal more.

3176 Q. You knew he was getting 12½ percent on lath, didn't you?

A. I think that I did, yes, sir.

Q. And at \$15 a thousand, 12½ percent is \$1.65, about, isn't it?

A. Yes, sir.

Q. So that he was paying \$13.35 for the lath and reselling it at \$15, wasn't he?

A. Yes.

Q. And you went to him and said, "Sell it to me at something less than \$15", didn't you?

A. Yes, I guess I did.

Q. And he said, "No, if I sell it to you, I sell it to you at \$15", didn't he?

A. He didn't say it that way, but substantially that is what he said.

Q. Now he said, "I will give you 15 percent on plaster because I manufacture the plaster," didn't he?

A. Yes, sir.

Q. And thereafter, the Oakfield Gypsum Products Company sold you plaster, as evidenced by the written contract, Exhibit 357, at a 15 percent discount plus freight absorption, didn't it?

A. Yes, sir.

Q. You testified that in 1933, you met Mr. Eldred in Washington and had a talk with him; do you  
3177 remember that?

A. Yes, sir.

Q. Mr. Eldred was an officer of the Oakfield Company, wasn't he?

A. Yes, sir.

Q. Didn't Mr. Eldred tell you that while he would give you a generous discount on plaster, he would not share his discount on board?



A. Yes, but he didn't put it that way.

Q. Well, you testified about that in the criminal case too, didn't you?

A. Yes, sir.

Q. Didn't you there say that Eldred told you that he couldn't afford to pass on any of the 12½ percent, because that was all he got out of his purchase of wallboard from a licensee?

A. Yes, sir, that is part of it.

Q. Mr. Eldred told you that he would give you a 15 percent discount on plaster, didn't he?

A. Yes, sir.

Q. And he did?

A. Yes, sir.

Q. Now let me look at Mr. Eldred's letter of April 27, 1935, which is Exhibit 359.

(Exhibit 359 handed to the witness.)

3178

By Mr. BROMLEY.

Q. You remember receiving that letter, don't you?

A. Yes, sir.

Q. And you know what it refers to, don't you?

A. Yes, sir.

Q. It refers to figure-head or multiple bidding, doesn't it?

A. Yes, sir.

Q. Now you knew that all the time during your direct-examination, didn't you?

A. You mean here or in the criminal court?

Q. Here in this court. Can't you answer that?

A. Not without an explanation, I can't answer yes or no.

Q. You can't answer it yes or no?

A. No, sir.

Q. Well, the situation that this letter concerns itself with has to do with a Government building project, does it not?

A. Yes, sir.

Q. And bidding on Government building projects is a very common occurrence in the gypsum industry, isn't it?

A. Yes, sir.

Q. And was in 1935, wasn't it?

A. Yes, sir.

3179

And it is the custom of the Government on such building projects to award the contract for gypsum board to the lowest bidder, isn't it.

A. Yes, sir.

Q. And depending on the importance of the work and

its location, there are many or few bidders in the gypsum industry, isn't that right.

A. Yes, sir, as you say, depending on location.

Q. And those bidders are sometimes dealers and sometimes jobbers and sometimes companies like your company, the Fairmont Company, and like the Oakfield Company, aren't they?

A. Yes, sir.

Q. Now you knew, didn't you, that the Oakfield Company was owned by 3 parent companies in the building material business, one called the American Hardwall Company, one called the Paragon Company of Scranton, and the other, the Paragon Company of Syracuse?

A. Yes, sir.

Q. The particular Government job referred to in Exhibit 359, so far as your bid was concerned, called for gypsum board, didn't it, either lath or wallboard?

A. I think so.

Q. And you bid on that job, the Fairmont Company, didn't you?

3180 A. Yes, sir.

Q. And the Oakfield Company bid on the job, too, didn't it?

A. Yes, sir.

Q. And its 3 parent companies bid on the job too, didn't they?

A. I can't say.

Q. Don't you remember?

A. No, sir, if I ever knew.

Q. Well, look at the letter, Exhibit 359, the first sentence in the second paragraph.

A. Oh, yes, it says that they did.

Q. Yes.

Now isn't it the fact, Mr. Spease, that what Mr. Eldred was referring to in Exhibit 359 as having been objected to by USG, was that all five of you fellows put in bids at the same price, and under the prevailing custom of the Government, identical price bids are put in a hat and pulled out by choice, the result being that your little group had five times the chance of any other bidder?

A. That wouldn't do me any good.

Mr. BROMLEY. I move to strike that out as not responsive.

Justice STEPHENS. It may go out.

By Mr. BROMLEY.

Q. Will you answer the question?

3181 Justice STEPHENS. Read the question to the witness.

(The question was read by the reporter.

The WITNESS. I don't know.

By Mr. BROMLEY.

Q. Did you get the award of the contract?

A. No, sir.

Q. You did not?

A. No, sir, we did not.

Q. I thought you told us this morning that the Oakfield Company would not furnish you the board to carry out this contract. Didn't you say that this morning?

A. Yes, after we put in a bid —

Q. (Interposing.) Just a minute, didn't you say that this morning?

A. If I did I was a little confused. We withdrew our bid.

Q. You never got the award of the contract, then, did you?

A. No.

Q. And you didn't have any need for board to fill an order from the United States Government on this job, did you?

A. No, we didn't get it, we didn't bid on it.

Q. Well, you bid on it and withdrew your bid?

A. Yes, sir.

Q. When you got this letter, Exhibit 359, didn't you understand that the objection which USG had was  
3182 to all five of you putting in identical bids under the custom of drawing the bids from a hat, by the Government?

A. No, sir, I didn't.

Q. Didn't you know that that was contrary to the provisions of the NRA Code in the Gypsum Code, then in full force and effect?

A. No, sir.

Q. You were a member of the Code; weren't you?

A. Yes, sir.

Q. You went to Code meetings, didn't you?

A. Yes, sir.

Q. Didn't you ever read it?

A. Yes, sir.

Q. Don't you remember that this practice of figure-head or multiple bidding was an unfair practice under the Code?

A. I don't recall.

Q. Well, think a minute. Wasn't it a common practice prior to the adoption of the Code?

A. I can't answer that.

Q. And you can't think whether the Code prohibited it or not?

A. No.

Justice STEPHENS. The Court will suspend at this time until tomorrow morning at 10 o'clock.

3183 Before we adjourn, Mr. Finck, you made inquiry yesterday about the 22nd day of February. Unless it is quite an inconvenience to counsel in the case, the Court would prefer to hold court on that day, because we are anxious to move forward in this case as rapidly as we can, and there will have to be quite an extensive adjournment in March on account of the Patent calendar. So we will hold court on the 22nd.

Mr. Johnston, we are not yet able to answer your question as to when we will adjourn. I will have to check into some of my own engagements, and that will take a day or so to do that. I will let you know, however, sometime this week.

Mr. STEFFEN. Your Honor, may I ask, if there are only a few more questions on cross-examination, we would like very much to let Mr. Spease go home if he may.

Justice STEPHENS. How much more have you, Mr. Bromley?

Mr. BROMLEY. Quite a lot.

Justice STEPHENS. I think we had better not attempt to hold over, because the Government will undoubtedly have some re-direct-examination, and there is so much transcript to read. I am sorry, Mr. Steffen.

(Thereupon, at 4:05 o'clock p.m., a recess was taken until 10:00 o'clock a.m., February 9, 1944.)



3184 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., WEDNESDAY, FEBRUARY 9, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3192 Thereupon, J. R. Spease, a witness, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

CROSS-EXAMINATION (Resumed) by Mr. BROMLEY.

Q. In connection with your testimony yesterday, have you thought of the name of the man in New Orleans?

A. Walter Jahnche—J-a-h-n-c-h-e, I believe it is; it is a French name and I am not sure of the spelling.

Q. Isn't it spelled—J-a-h-n-c-k-e?

A. I think you are right.

Q. Now the Jahncke Service Company is the name of a very large building supply dealer in New Orleans, isn't it?

A. Yes, sir.

Q. And the Jahncke Service Company owns the Crescent Wall Plaster Company, did you know that?

A. Not to be sure, no. If I did, I had forgotten it.

Q. Well, you mentioned the Crescent Wall Plaster Company in your testimony yesterday when you were giving what you called a list of jobbers, do you remember that?

A. Yes, sir.

Q. Now the Crescent Wall Plaster Company is a concern which manufactures sanded plaster, isn't it?

A. They did at one time, I have lost all track of them, I don't know.

3193 Q. You don't know what they do?

A. Not now, no, sir.

Q. Do you remember that the Crescent Wall Plaster Company was managed by a man named McCausland?

A. No, sir, I forget all about it. As I say, I was going back a good many years when I was trying to recall people, and I have forgotten them, and they have forgotten me by now.

Q. But you do know that the Jahncke Service Company is one of the biggest dealers, building supply dealers, in New Orleans?

A. Yes, sir, they always have been.

Q. Do you remember that the Crescent Wall Plaster Company had a manufacturing plant?

A. No, sir.

Q. Don't you remember that in 1928, and prior thereto, the Crescent Wall Plaster Company was manufacturing sanded plaster?

A. No, sir.

Q. Don't you remember that after 1928 the Crescent Wall Plaster Company was manufacturing sanded plaster?

A. No, sir.

Q. Then you really don't know what they were doing after 1928, do you?

A. No, sir.

3194 Q. You mentioned the Crown Wall Plaster Company—do you remember that?

A. Yes, sir.

Q. Where did you say they were?

A. Braddock, Pennsylvania.

Q. Do you remember who the owner of that business was?

A. He is dead now, he and his sisters. I knew him pretty well, yes.

Q. What are their names?

A. My memory is going back a good many years for all of these people, and I don't believe I can state.

Q. How long ago did the owner of this business die?

A. Maybe five years or ten.

Q. Would it surprise you to know that he died over twenty-five years ago, Mr. Spease?

A. It usually turns out that way. I knew him pretty well. I have known him back a number of years.

Q. You don't really know whether he died five years ago or thirty years ago, do you?

A. No, sir. Do you refer to the old man, Mr. Bromley, or the young man?

Q. What one were you referring to?

A. Well, sir, I can't recall his name.

Q. So you don't know which you were referring to, do you?

A. He and his sisters had been there for many 3195 years, I knew them all. A fellow by the name of Elsasser, I think his name was, managed the company thirty years ago. He passed out of the picture. I can think of that man's name in a few minutes. He and his sisters carried it on.

Q. Well, there came a time when this man whose name you can't remember, who is now dead, and his two sisters, sold out the business to somebody else. Do you remember that?

A. No, sir, it is too far back.

Q. Don't you remember that twenty years ago this man and his two sisters sold this business to a man named Rutter?

A. No, sir, I have forgotten.

Q. Don't you remember that the Crown Wall Plaster Company in Braddock has been operated by the Rutter brothers for nearly the last twenty years?

A. I forget, sir.

Holmes is the man I was trying to think of. They were down at McKees Rocks, in the wind-up of the business, and either sold it or moved, I don't know what the story is, I forget.

Q. That man's name was Wesley Holmes, wasn't it?

A. Yes, sir.

Q. Now that you have thought of his name, don't you remember that it is the fact that he has been dead for more than twenty-five years?

A. I am surprised to hear you say it, but if you say so, it must be true.

3196 Q. It must be. Now the Crown Wall Plaster Company was a manufacturer of sanded plaster, wasn't it?

A. Yes, sir.

Q. And since at least 1925, the Crown Wall Plaster Company in Braddock, Pennsylvania, has been a large building supply dealer, hasn't it?

A. I can't say.

Q. Now you mentioned next, as I remember, the Perry Manufacturing Company at Perryopolis, Pennsylvania, is that right?

A. Yes, sir.

Q. The town of Perryopolis, Pennsylvania, is just outside Uniontown, isn't it?

A. Yes, sir.

Q. And the Perry Manufacturing Company is a brick manufacturing company—do you remember that?

A. Yes, sir.

Q. And for more than five years the Perry Manufacturing Company has not been in business at all, has it?

A. I don't recall. Their manager, Fred Ruppert, died, but I don't know what the outcome was, I have lost track of it.

Q. How long ago did the manager die?

A. I don't know.

Q. Don't you remember that it was over ten years ago that the manager died?

3197 A. No, sir, I do not.

Q. Don't you remember that this brick manufacturer had a lot of labor trouble more than five years ago?

A. No, sir.

Q. As a result of which the business was closed down and has never since been operated.

A. No, sir, I have lost track of it.

Q. Did you hear of the Charles F. Eggers Company in Uniontown, Pennsylvania?

A. Yes, sir, I understand they owned the Perry Company.

Q. And the Charles F. Eggers Company was one of the biggest building supply dealers in Uniontown, wasn't it?

A. One of them, yes, sir.

Q. And as you say, the Eggers Company owned this



Perry Manufacturing Company which manufactured brick?

A. I have always understood that it did.

Q. The next company that you mentioned, as I remember it, was the Ruggles Company, is that right?

A. That was one of them, I said the old company, yes, sir.

Q. What did you mean by that?

A. Well, I simply meant it was one of the companies, the building supply firms, that I knew of years ago, and I don't think they are in Columbus any more, but I am not sure about that.

3198 Q. They haven't been in Columbus for twenty years, have they?

A. I don't know.

Q. They never were in Columbus at any time, were they?

A. Well, when I knew them, yes, sir. that is where they were.

Q. Weren't they in Kingston?

A. No, sir, Columbus.

Q. Well, how long ago did they go out of business?

A. I can't tell you.

Q. Now the Ruggles Company, when you knew it, was a large building supply dealer, wasn't it?

A. They were dealers, too, yes, sir.

Q. You mentioned the Teachout Company, do you remember that?

A. Yes, sir.

Q. The Teachout Company is a large retail dealer, isn't it?

A. I don't know anything about them, they are at Cleveland, Ohio.

Q. Then you mentioned the Cleveland Building and Supply Company, do you remember that?

A. Yes, sir, the Cleveland Builders Supply.

Q. The Cleveland Builders Supply, yes.

Now this company owns and operates the biggest retail yard in Cleveland, doesn't it?

3199 A. I think they do, I am not sure. Goff-Kirby is one of the other big companies there.

Q. Is that a dealer, too?

A. I think they are both dealers and jobbers, but I am not sure that I know.

Q. Now you mentioned Fisher Brothers, do you remember?

A. Yes, sir.

Q. The correct name of that firm is the Fisher Lime & Cement Company, isn't it?

A. Yes, sir.

Q. And the Fisher Lime & Cement Company operates perhaps the biggest retail building material supply yard that is in the City of Memphis, doesn't it?

A. I think so.

Q. And likewise it operates a very large retail building supply yard in Little Rock, Arkansas, doesn't it?

A. I don't know.

Q. You don't know that?

A. No, sir.

Q. Well, do you know that the Fisher Lime & Cement Company are dealers?

A. I suppose they are, yes.

Q. Isn't it a fact, Mr. Spease, that a good deal of the plasterboard which you purchased from American during the three-year period from 1930 to 1933, was shipped 3200 directly to your headquarters at Fairmont, West Virginia, for resale by you in your two retail stores?

A. I can't, your Honor, answer that question "yes" or "no".

Mr. BROMLEY. Well, I will withdraw it and ask you this.

By Mr. BROMLEY.

Q. Isn't it a fact that a large number of the cars of plasterboard which you bought from American during that period were shipped to you at Fairmont?

A. If you mean in proportion, I would say no.

Q. Were there any cars shipped to you at Fairmont?

A. Oh, yes. We have a good many small dealers that come in there from small communities and haul out board.

Q. And that board you furnished to them out of your retail stores?

A. Out of our warehouse, but we sell it to them as a dealer.

Q. Out of your retail stores?

A. No, it doesn't go through the stores at all, they are separate.

Q. You have a warehouse in addition to the stores?

A. Warehouse and office, yes, sir, on Tenth Street.

Mr. BROMLEY. That is all.

Justice STEPHENS. Is there any redirect examination?

3201 Mr. KNUFF. Is there any other cross-examination?

Justice STEPHENS. I am sorry. Is there any other cross-examination by other defendants' counsel?

(No response.)

Apparently not, Mr. Knuff. You may proceed.

REDIRECT EXAMINATION by Mr. KNUFF.

Q. Mr. Spease, yesterday on cross-examination Mr. Bromley asked you this question, and I am reading from page 3449:

"Q. Don't you remember that you limited it to gypsum board before the criminal jury?"

Mr. Bromley at that time was referring to the conversation that you had with Mr. Baker in 1930. Do you recall that question yesterday?

A. I think I do.

Q. You did testify in the criminal case in the District Court that was tried before Judge Goldsborough, did you not?

A. I did.

Q. Mr. Kelleher, who represented the Government, asked you the following questions and you gave the following answer —

Mr. BROMLEY (interposing). Where?

Mr. KNUFF. On page 2616.

"Q. With whom in the—I will withdraw that. Whom in the National Gypsum Company did you contact to purchase gypsum board from National?

3202 "A. Mr. Baker.

"Q. That is Mr. Melvin H. Baker?

"A. Yes, sir, the President, I think.

"Q. Will you state the conversation which you had with Mr. Baker?

"Mr. BROMLEY. The same objection.

"The COURT. Overruled.

"Mr. LEAHY. Will you place the time, please.

"By Mr. KELLEHER.

"Q. Will you place the time?

"A. Around 1930.

"Q. Will you state the conversation you had with Mr. Baker?

"A. We had several of his men calling on us at Fairmont to solicit our business, both for plaster and plasterboard and we were pretty well satisfied. We did not pay a great deal of attention. I think I missed their man several times by being absent from home myself. So, we decided we would use some place else and would try National.

"I wired Mr. Baker 'Can I see you at your office tomorrow?' I think he wired back 'Yes,' but he was busy. I went up to Buffalo and had a very pleasant visit with him because I have known him for many years, but I think he said, 'Spease, you might as well go back home and forget it; you are not going to be able to buy from us or 3203 anybody else,' and I returned home.

"Q. At that time did you try to purchase gypsum board from National?

"A. Yes, sir.

"Q. And Mr. Baker's reply covered gypsum board?

"A. Yes, sir."

Do you recall that testimony, Mr. Spease?

A. I think so, yes, sir.

Q. At the criminal trial were you asked any questions concerning the purchase of plaster?

A. No, I don't think I was.

Mr. BROMLEY. Wait a minute. "I object to that. The very question that Mr. Knuff read was, "Will you state the conversation you had with Mr. Baker," in 1930.

Now that called for the conversation, and if there was anything said about plaster it called for the conversation about plaster.

Mr. KNUFF. There is nothing inconsistent at all about his answer. That is all I want to bring out. If Mr. Bromley will stipulate that he doesn't regard his testimony on the witness stand yesterday, that is Mr. Spease's testimony on the witness stand yesterday, as inconsistent with the testimony that he gave before the criminal jury, I will pursue it no further.

Mr. BROMLEY. That is entirely and completely inconsistent. He testified here that Baker told him that 3204 he wouldn't sell him plaster. He testified there that the conversation had to do with board. I think it is a fair inference to say that his testimony was, there, that it only had to do with board because he was asked by Mr. Kelleher to state the conversation, and he stated it.



Then Mr. Kelleher asked if that covered board, and he answered yes, that it did.

Justice STEPHENS. It seems to the Court that the matter reduces itself to a question of argument between counsel, and conclusion by the Court, as to whether or not the testimony is inconsistent in view of what Mr. Knuff has read out of the record, and it is not helpful to ask the witness whether he remembers whether he was asked about plaster, although possibly you are entitled to do that, Mr. Knuff, as indicating what his memory of that conversation was.

What he was asked about is in the record of the criminal proceeding, and that is the best evidence of it, I suppose.

Mr. KNUFF. That is what I wanted to get before this Court, and I haven't any other way to get it before this Court than to read the questions and answers.

Justice STEPHENS. You have done so.

Mr. BROMLEY. May the answer of the witness be stricken, please?

Mr. KNUFF. I think not, your Honor.

3205 Justice JACKSON. What was the question and answer?

Mr. KNUFF. Suppose I rephrase the question.

Justice STEPHENS. Very well.

Mr. BROMLEY. May the answer go out, then?

Justice STEPHENS. Yes, if it is to be rephrased.

By Mr. KNUFF.

Q. Mr. Spease, were you specifically asked by Mr. Kelleher anything concerning the purchase of plaster?

Mr. BROMLEY. I object to that as calling for a conclusion, because the record shows he was asked the question, "Will you state the conversation which you had with Mr. Baker?" This is an argumentative question.

Justice STEPHENS. We are inclined to think that it is proper redirect examination, upon consideration, as the answer may tend to indicate that the witness in the questions and answers at the criminal proceeding didn't understand that he was being asked specifically about plaster. What the questions and answers actually were, of course, and whether or not he might reasonably have understood that he was being asked about plaster, is a conclusion for the Court to reach. But we will overrule the objection.

Mr. KNUFF. Will you read the question to Mr. Spease so that he can answer it?

(Thereupon, the pending question was read by the reporter.)

The WITNESS. No, sir.

3206

By Mr. KNUFF.

Q. Mr. Spease, Mr. Bromley yesterday asked you if you testified in the criminal court that you had a conversation with Mr. Baker in 1930, and your answer was that you did.

Mr. KNUFF. May I have Exhibit 352, please?

(Exhibit 352 handed to the witness.)

By Mr. KNUFF.

Q. Your testimony yesterday was to the effect that this conversation which you had with Mr. Baker in 1930 was in April, 1930. Do you recall that?

A. Yes, sir.

Q. When you were interrogated at the criminal case by Mr. Kelleher, did you have before you the exhibit which you now have, Exhibit 352?

A. I don't recall that I did.

Q. And does Exhibit 352 enable you to fix that date more specifically than "in 1930"?

A. Definitely.

Q. On page 3468, Mr. Bromley asked you this question:

"Q. And you said on your direct examination that you thought your jobber organization could do that work better than a manufacturer?"

And your answer was: "Yes, sir."

Mr. Bromley at that time was referring to the sales that your organization could make of plasterboard to a better advantage than some of the manufacturers.

3207 Do you care to make any explanation as to what you meant by that answer?

A. I simply meant that we saw our people so much more often, and were closer to them, and gave them more assistance than the average manufacturer could.

Q. Do any of the small manufacturers have salesmen traveling the same territory that your salesmen do?

A. Yes.

Q. Did Ebsary have a salesman down there?

A. I think they had a man in Virginia, I don't think they had anyone in West Virginia.

Q. And did Kelley have any person traveling that territory?

A. None to my knowledge, no, sir.

Q. Did Certain-teed have anybody down there?

A. Yes, they had a man; maybe two men, I don't know.

Q. Did American have any person?

A. They had a man who came into West Virginia once in a while.

Q. Now what service does a jobber perform for a small manufacturer?

A. Well, we call on them often, and a small manufacturer that does not have many salesmen can't see his customers very often. We, for them, are selling so many different things that we job to these small dealers that we see them frequently; they get us on the phone, our man goes out there in a few hours and goes out with their men and helps them; and they can send to Fairmont, to our warehouse, and pick up a ton of plaster of Paris, something that they run out of and can't afford to buy in carloads—they buy at a dealer's price, of course—they buy plasterboard from us at a dealer's price and send in and get a little. There are so many, many things that I could name.

Q. A small gypsum manufacturer like Ebsary—are his products limited?

A. I would say yes.

Q. What products would you say Ebsary salesmen would have to offer?

A. Plasterboard, plaster lath, plaster, and plaster of Paris.

Q. And what products would your salesman offer? Would he offer those same products?

A. He would offer those same products.

Q. And in addition, what would he add?

A. Metal lath, roofing, insulation board, lime, sewer pipe, drain tile, brick, cement—no, I beg your pardon, not cement—I would say dozens of things.

Q. Roofing material?

A. Roofing material, waterproofings.

Q. Tile?

3209 A. Tile, drain tile, sewer pipe.

Q. And would you say that a jobber performs a definite service for the small manufacturer?

A. I would, indeed. They send in to our retail stores and

get acquainted with us, and buy paint at a retail price sometimes, something that they don't have and are out of, rather than wait for it they send in and get it from us because we buy it in carload lots, but they pay the retail price for paint.

Q. Now, Mr. Bromley yesterday brought up the subject of multiple bidding. Do you recall that?

A. Yes, sir.

Q. Did the Fairmont Wall Plaster Company have any financial interest in the Paragon Plaster Company, the Paragon Plaster & Supply Company of Scranton, or the American Hardwall Plaster Company?

A. Nothing in any of them.

Q. Did the Fairmont Wall Plaster Company have any financial interest in the Oakfield Gypsum Products Company?

A. They did not.

Q. Did you, as an individual, have any financial interest in any of those four companies, that is, Oakfield, American Hardwall, Paragon Plaster, and Paragon Plaster & Supply?

A. I did not.

3210 Q. Did any of those four companies have any financial interest in the Fairmont Wall Plaster Company?

A. No, sir, they never did.

Q. Mr. Bromley also brought up the question of profits, or the commissions that you make on plaster, and I want to go into that a little bit with you, Mr. Spease.

In your sales of plaster, how is that sold, in a straight car or in a mixed car? How is it generally sold?

A. Nearly always in mixed carloads.

Q. And what else would be in that carload?

A. There would be plaster, plasterboard, lath, lime, and plaster of Paris, and Keene's cement.

Q. And you would call that a mixed car, would you not?

A. Yes, sir.

Q. And it is so called because the car is not made up of any one particular product, but the products in the car are mixed; is that correct?

A. Yes, sir.

Q. And a car that is made up entirely of one product is considered in the trade as a straight car, is that correct?

A. That is true.

Q. Now what would you say would be a fair average



amount of plaster that would be in any one car that your organization sold?

3211 A. Three, five, eight, to ten tons.

Q. Anywhere from 3 to 8 or 10 tons of plaster would be in that car, and the other portion of the car would be made up of Keene's cement or board or lath or anything else that took the same freight rate; is that correct?

A. That is correct.

Q. And what would you say would be the average sales value for a mixed car, in dollars and cents.

A. \$400 or \$500.

Q. Would it be that much, do you think?

A. In those big 40-ton cars, yes, sir. But if you want an average car—

Q. (Interposing). Yes, an average.

A. Probably \$300 to \$400.

Q. \$300 to \$400?

A. Yes.

Q. What was your profit on a ton of plaster?

A. I believe it was a dollar.

Q. A dollar a ton?

A. Yes.

Q. So that in a car having a value of \$300, that contained 10 tons of plaster, you would have a gross profit of \$10, is that correct?

A. Yes, sir.

Q. Could you stay in business long on that basis?

3212 A. Not and feed some of the people we have to, no, sir.

Q. And if the plaster went down to the prices that prevailed around 1927 or 1928, when plaster was selling at around \$4 a ton, what would be your gross profit?

A. The more we sold the sooner we would quit.

Q. Were prices low for plaster in 1928 and 1927?

A. Yes, sir.

Q. Was there a price war on at that time?

A. I think that was the time that we had it down to where, as we say, they gave plaster away, \$2 or \$3 at the mill.

Q. When you say they gave plaster away, do you mean that facetiously, or do you mean that they actually gave it away?

A. I meant they did give it away.

Q. Gratis?

A. I don't see how they could put it on the cars at \$2 and \$3 at the mill.

Q. Let's understand one another. Do you mean they actually gave it away, or do you mean that as a facetious statement?

A. Well, I guess I mean it the other way.

Q. Did the prices stiffen after 1928 and become more stable?

3213 A. Yes, sir, they did.

Q. What are the prices for plaster now, if you know?

Mr. BROMLEY. I object to that as not proper re-direct-examination.

Justice STEPHENS. Well, it is a new topic. It is not within the original examination, and therefore is not re-direct-examination. It doesn't tend to explain the cross-examination because it goes to an entirely new subject. However, if you regard it as material to your case you may ask the witness questions, and then there will be cross-examination upon it.

Mr. KNUFF. We will withdraw the question.

May we take a recess at this time, Your Honor?

Justice STEPHENS. Yes, we will take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

Justice STEPHENS. Proceed.

By Mr. KNUFF.

Q. This morning, Mr. Spease, Mr. Bromley asked you about the Jahncke Company at New Orleans, and the Crown Wall Plaster Company at Braddock, Pennsylvania, and the Perry Manufacturing Company at Perryopolis, Pennsylvania, and the Ruggles Company at Columbus, Ohio, and the Teachout Company at Cleveland, Ohio, and the Fisher Lime & Cement Company in Memphis, and he asked

3214 you if they were dealers. Your answer was that they were. Did you mean to imply that before 1930 they were not also jobbers?

A. No, sir. They were dealers and jobbers.

Mr. KNUFF. That is all the re-direct-examination we have.

Justice STEPHENS. Re-cross?

Mr. BROMLEY. Yes, Your Honor.

## RE-CROSS EXAMINATION by Mr. BROMLEY.

Q. In connection with your testimony about straight and mixed cars, isn't it a fact that due to some rule or regulation of the Interstate Commerce Commission, shippers are not permitted to mix in one car anything other than gypsum products?

A. Yes, sir, I think it is.

Q. That is to say, you could not buy a mixed car made up of plaster and plasterboard and Keene's cement, to which there could be added any of these other things such as you have mentioned, like brick or lime or insulation board or cement or sewer pipe—that is right, isn't it?

A. That is true, yes, sir.

Q. I notice in going over the list of the products that you said you jobbed, you mentioned cement, and then withdrew it. You have never jobbed cement, have you, at 3215 any time?

A. No, sir, not in recent years.

Q. How far back does that go? I said, "You never have at any time, have you?"

A. I don't recall.

Q. At least you haven't jobbed cement for a great many years, will you say that?

A. Yes, sir.

Q. That is true, is it?

A. Yes, sir.

Q. You remember the excerpt from your testimony in the criminal case which Mr. Knuff read you, beginning: "Whom in the National Company did you contact?"

A. Yes, sir.

Q. And it is the fact, isn't it, that in the criminal trial at page 2616, you were asked this question:

"Will you state the conversation you had with Mr. Baker?"

A. Yes; yes, sir.

Q. And you answered that question, didn't you?

A. I tried to, yes, sir.

Q. Now do I understand you to intimate that you thought you were only being asked to state such part of the conversation as had to do with gypsum board?

A. At that time, yes, sir.

3216 Q. And therefore, you intentionally left out any mention of plaster, is that it?

A. I wouldn't think so.

Q. And the reason you wouldn't think so is because you remember very clearly that when you were asked to give the conversation that you had with Mr. Hansen, you proceeded to tell the jury all about what Mr. Hansen said about plaster; isn't that right?

A. If that is in the evidence.

Q. Don't you remember?

A. Yes, sir.

Q. It is in the evidence, isn't it?

A. I think so, yes, sir.

Q. In fact, it is in the evidence right after the part that Mr. Knuff read to you, isn't it?

A. I don't have that with me, my testimony.

Q. Don't you remember at the criminal trial that right after you were asked to state the conversation you had with Mr. Baker, and at the bottom of page 2617, you were asked, "Will you state the conversation which you had with Mr. Hansen?"

A. I looked it over.

Q. Do you remember that?

A. I looked it over, but I don't recall.

Q. Don't you recall now that beginning at the top of page 2618 and going down that whole page, you  
3217 answered that question by stating what Mr. Hansen had said to you, and you answered it this way:

"I asked him if he would take our empty sacks, Fairmont Wall Plaster bags, and fill them with plaster and sell us plaster and wallboard so that we could continue to ship our materials into seven or eight states which we had been covering for a period of years. He said 'I would like to. We can pack your plaster but cannot sell you any wallboard.'"

Now when you answered that question, you didn't think that it was intended that you should leave out such part of Mr. Hansen's conversation as referred to plaster, did you?

A. No, sir, I suppose not.

Mr. BROMLEY. That is all.

Justice STEPHENS. Any further re-direct-examination?

Mr. KNUFF. No, Your Honor.

Justice STEPHENS. Do the defendants wish to be heard further with respect to the admissibility of this testimony which has been received subject to a motion to strike?



There were some cases called to the attention of counsel yesterday which you may wish to be heard on.

Mr. BROMLEY. May it please the Court, I would like to be heard on *Lawler v. Loewe*, chiefly so I can perhaps develop —

3218 Justice STEPHENS (interposing). I will not require you to be heard at the moment. I was planning with respect to the rest of the day. About how long will you likely wish to be heard?

Mr. BROMLEY. Only a very short time.

Justice STEPHENS. Do you wish to be heard further, Mr. Steffen?

Mr. STEFFEN. We would like to reply to Mr. Bromley.

Justice STEPHENS. Are you through with this witness?

Mr. STEFFEN. That is what I wish to say, that if possible we would like to excuse the witness.

Justice STEPHENS. Judge Garrett inquires, Mr. Bromley, whether or not, if this evidence should be ruled, all of it, to be admissible, you have fully protected yourself by cross-examination on all of it?

Mr. BROMLEY. I have, sir.

Justice STEPHENS. Then this witness, I suppose, may be excused?

Mr. STEFFEN. Yes, Your Honor.

Mr. BROMLEY. Yes.

Justice STEPHENS. Have you another witness here?

Mr. STEFFEN. No, we have not.

Justice STEPHENS. Then you may be excused, Mr. Spease. Thank you for attending the court.

The WITNESS. Thank you, sir. (Witness excused.)

3219 Justice STEPHENS. We will hear you briefly now, gentlemen. I do not mean by that to limit you unduly. We will be glad to hear you as fully as you need to be heard to protect your rights.

Mr. BROMLEY. May it please the Court.

Justice STEPHENS. Proceed, Mr. Bromley.

Mr. BROMLEY. As I understand the holding, in the opinion of Justice Holmes in *Lawlor vs. Loewe*, it is this: That was a treble damage action brought under the Sherman Act, brought by the Loewe Company, a hat manufacturer, against the officials of a union. Being a treble damage suit, the charge was that the officials of the union had conspired in restraint of trade to damage the plaintiff's business, and the proof showed that the union officials had com-

bined and agreed to put into operation both a primary and a secondary boycott against the Loewe Company, and in execution of that unlawful combination had circulated to the customers of the Loewe Company lists described as "unfair" lists or "do not patronize" lists.

The proof showed that the union had sent those lists out to the customers of the Loewe Company, that is, I assume, to the wholesalers or retailers who bought hats from the Loewe Company, which manufactured the hats.

In a single sentence, near the end of the opinion, Justice Holmes said that it was competent for the court to receive testimony from these customers to the effect that they ceased dealing with Loewe because they had received the

3220 "unfair" list, and letters from customers to the Loewe Company were likewise ruled to be admissible.

Now it seems to me that the significant fact about that is that of course it was necessary for the plaintiff to prove that he was damaged, and the plaintiff had to prove that the reason his customers refused to buy hats from him was because the defendants had sent out an "unfair" list to them, and they had received it and read it and acted on it. So that on the simple doctrine of causation, it was not only material and competent, but it was necessary that the plaintiff establish that the reason the customers of Loewe stopped doing business with Loewe was because of what the defendants had done, i. e., had sent them an "unfair" list which caused them to deem it wise not to deal with Loewe any more.

So I say that was a material fact in issue in the case, and was both material and competent on the theory of causation of proof of damage.

Now you can call it proof of a state of mind, and say that that is a ruling that the state of mind of an actor in connection with an ambiguous act, is admissible. But in essence, it seems to me nothing but a holding that it was a part of plaintiff's cause of action, that he must prove that the customers ceased to give their custom to the plaintiff because of what the defendants had done.

Now I have difficulty in finding an analogy between that situation and the present one. I think it clear that your Honor's statement is entirely correct that if it be received, it is of course subject to two separate steps by way of connection.

If it be received it must be received subject to the usual connection that independent proof of a conspiracy be some time offered; secondly, and more important in this instance, it certainly must be received subject to proof that the defendants exercised coercion upon Oakfield in some manner.

I agree with what I understand to be the statement of the Court in those two respects. I also agree with the statement of the Court that Hansen's and Eldred's statements cannot be received as evidence of the truth of what they said.

The difficulty that I have is in seeing the materiality in this case of the state of mind of Oakfield, because it seems to me, in this case, that state of mind is immaterial, it not being a necessary element in the proof of any cause of action, the necessary element being merely that the defendants combined to coerce these people, and in execution of that combination brought pressure to bear upon them in some way.

Therefore, it seems to me that this proof as to state of mind is immaterial.

Justice STEPHENS. Will you read that portion of Mr. Bromley's statement where he referred a few moments ago to the two items which must be proved in order to  
3222 connect the testimony.

(Thereupon, the reporter read the record as requested.)

Justice STEPHENS. Do you wish to be heard, gentlemen? Perhaps I ought, in fairness to Mr. Bromley, to ask a question before you proceed.

Mr. Bromley, the thought that I had, and I think perhaps my colleagues have shared it with me in our discussions, is this: I am pretty well convinced that this isn't a case for the ambiguous act doctrine, but there does seem to be a distinction drawn in the authorities, I think it is probably the distinction that Mr. Justice Holmes in his single sentence had in mind, but it is the distinction which is mentioned in other cases and in Wigmore, between statements brought into evidence and permitted in evidence because they tend to explain an act which is legally in issue and which is legally ambiguous, and statements which do show a state of mind regardless of their truth.

It has seemed to us that perhaps there is an analogy here in this situation. The charge in the complaint is that there was elimination of jobbers, and the claim of the Gov-

ernment is that it will prove that jobbers were eliminated, to be specific in this instance by pressure brought upon Oakfield as a result of its knowing or being caused to know that Kelley's license might be withdrawn if Oakfield sold to jobbers.

3223 Now it has occurred to the Court that possibly under the second theory that I mentioned, the one that seems to be illustrated by the Lawlor case, the remarks of Hansen and Eldred may tend to prove that they were in a state of mind of being under duress or coercion, because of their knowledge of what might happen if they did sell to Fairmont, subject of course to the two items of connection which Mr. Bromley indicated and which the Court referred to.

Mr. BROMLEY. It seems to me that in this cause of action the only material thing is our state of mind, not theirs.

Justice STEPHENS. Wouldn't it tend to show, if the remarks of Eldred and Hansen indicated that they were in a state of fear—wouldn't it be a circumstance tending to show the effectiveness of your alleged compulsion? In other words, to put it colloquially, if the victim squeals, isn't that some evidence that he at least thinks he is being pinched? (Laughter.)

Mr. BROMLEY. Well, I think, to answer the question as you put it, I must say yes, but where the squeal is a hearsay conversation, I am not sure that it can be proved that way.

Justice STEPHENS. Well, of course that is the question in the case, as to whether it is hearsay or whether it is a circumstantial utterance of some type, either admissible because the hearsay rule is not applicable, or because it is a recognized exception to the hearsay rule.

We have ruled definitely that the declarations—  
3224 and I think we have indicated or should have indicated that the acts as well as the declarations—of Oakfield and its officers, are not admissible as declarations and acts in the usual sense, to bind the defendants, because Oakfield is not charged as a co-conspirator. So that is out. The only point here is, and perhaps it is whittled down to a very fine point as far as its real worth in the case is concerned, especially in view of the fact that we are assuming that the Government will call Hansen and Eldred to the witness stand, and perhaps aid its case in that way—it seems to us that there may be something to the contention—



and I do not state this as an advance ruling—that the remarks of Hansen and the remarks of Eldred, although not binding as declarations of co-conspirators, may be utterances of a circumstantial character tending to indicate that they were in a state of duress or that they had knowledge or were in a state of mind that they couldn't sell to Fairmont, as a circumstance indicating that there was a chain or series of coercive acts which ultimately lodged themselves against Oakfield, and found their source in the defendants in the alleged conspiracy.

You said yesterday, Mr. Bromley, at page 3383 of the record at the bottom of the page:

"I think I ought to say that I believe there to be a distinction between what I have been arguing about up to now, and what he says he is going to show. If he 3225 can show that USG withdrew from Kelley the consent which it had issued to Kelley to sell to Oakfield, or went to Oakfield and said, 'Now, you do what I say or I will withdraw the consent', then I should think that would be material, that is something we did."

Of course that is not a concession as to the admissibility of these statements, but it would seem to me to indicate that you recognized that the Government might be entitled to prove a succession of coercive acts impinging eventually upon Oakfield, and through it, upon Fairmont, under the charge.

Mr. BROMLEY. I think that is so, where we do it.

Justice STEPHENS. Mr. Steffen!

Mr. STEFFEN. I only want to say a very few words, your Honor, largely in reply to Mr. Bromley's discussion of the Lawlor v. Loewe case.

I gather from his remarks that his difficulty, as he states it, with the Government's argument, is that he does not see, first, that it is material what the state of mind of Oakfield might be at the time of these transactions, and that I think calls for just a brief analysis of the pleadings and a reference again to our paragraph 45 (e).

3226 Paragraph 45 (e) says that the defendants, all of them, as a conspiracy—and of course we recognize that we must establish a conspiracy—but that the defendants as a conspiracy were dominating and controlling the manufacture and distribution of gypsum products by:

"(e) concertedly inducing and coercing manufacturing

distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

Now that is followed, if you will notice, by a sentence in Paragraph 121, which has already been brought to your Honors' attention. The second sentence says: "Since the year 1929, all gypsum board sold by all manufacturers and all manufacturing distributors (that is, all manufacturing distributors have sold gypsum board, as the sentence reads) \* \* at uniform and non-competitive prices", and so forth.

Now what I wanted to make clear was this, that the United States Gypsum Company, under their license agreements, in August, 1930, and again in 1932, made uniform the dealer price, that is, that the price to jobbers should be the same price as the price to dealers. I will have some remarks, at the proper time, on the ethics of that procedure. But what they did, in effect, indirectly and rather subtly, was to say, "We won't say you can't sell to jobbers, we will say that you have to sell to jobbers at the same price that you do to dealers."

3227 So when they dictated to Oakfield, as we allege, that they must sell all board at dealer prices, that meant that if they sold to a jobber they had to sell to a jobber at the dealer price, and it meant the elimination of the jobbers.

So that our Paragraph 45 (e) indicates the two things, that is, that they controlled the price, and that they also, by controlling the price, eliminated the jobbers. That, we say, is a matter of coercion, that is, that the defendants coerced and induced Oakfield, by forcing them to sell only at a uniform price to both dealers and jobbers fixed the price, and in addition eliminated the jobbers, all in one fell swoop.

Now as to the question of materiality. We say that it is material to show the state of mind of Oakfield as respects whether they were forced or induced to make a uniform price to dealers and to jobbers; and I cited yesterday the Hillmon case which is the grandfather of this line of authorities, I believe; and which has never been shaken, and which, I think, sustains the Government's position.

I would like to comment now on the Lawlor vs. Loewe case.

As Mr. Bromley stated, that case was a Sherman anti-trust case, and the question had to do with whether or not there was a secondary boycott, that is, if the defendants, the labor union, conducted a secondary boycott, that is, boycotted the dealers who were selling hats made by the Loewe Company —

3228 Justice STEPHENS (interposing). The Loewe Company was the plaintiff?

Mr. STEFFEN. Yes, they were suing for treble damages, and the labor union was the defendant.

One of the issues was whether or not there had been a secondary boycott and whether the dealers had been coerced and prevented from buying from the Loewe Company.

Now of course the difference between the two cases is that there was coercion to prevent the purchase, in the Loewe case, and here it is coercion to prevent the sale. But in both cases the same theory would apply. There the court admitted letters from those dealers, unsworn letters, hearsay statements, from the dealers to the manufacturer, to establish that in fact the dealers were being coerced by the defendants. That is, the labor union was alleged to have coerced, by secondary boycott, and forced them not to buy from the Loewe Company.

So it seems to me that the two cases come very close together on the question of coercion, and clearly, I think, the state of mind of Oakfield is a material factor to the plaintiff's case. In fact, we have got to establish one way or another, if we expect to establish 45 (e), that the manufacturing distributors were forced or induced to maintain uniform prices.

As you appreciate, there was an outright sale from the manufacturers to Oakfield, and ordinarily they  
3229 would be free to do anything they saw fit on the resale. If, however, they were restrained or coerced in their resale, in any manner, that constitutes a restraint of trade. And in order to establish that they were coerced, we ask—what did they say and what did they do.

Mr. Bromley has suggested that the reason Oakfield didn't sell to Mr. Spease was because their commission was so low. Now we suggest that what he said also is material to determine whether that is the real reason, or was the real reason. We think the real reason was that

Oakfield was afraid, they knew that they would lose their source of supply if they failed to sell at the prices which were prevailing to dealers.

I might say, Your Honors, that that concludes my argument on this point. I have one or two little matters that we might take up.

Justice STEPHENS. Just a moment, please. You haven't anything further to say on this topic?

Mr. BROMLEY. No, your Honor.

Justice STEPHENS. Then we will make our ruling at the present time.

We have discussed the matter quite thoroughly. We appreciate the arguments which have been made. We have read Lawlor v. Loewe, and one or two other cases, and we might as well rule now and have the matter disposed of.

3230 We are of the view that the motion to strike—  
which for convenience of counsel, appears at page  
3403 of the record—should be denied.

In effect, the reasons for our ruling have already been indicated, but to make them a little more explicit we will state that the complaint charges, in Paragraph 45 (e), fixing of prices, that is, "concertedly inducing and coercing manufacturing distributors to resell, at the prices raised and fixed by said companies as aforesaid, gypsum board purchased from said companies."

In Paragraph 45 (d) the charge is: "concertedly refraining from distributing gypsum board, plaster, and miscellaneous gypsum products manufactured by said companies through jobbers in the Eastern area" and so forth.

Now those two paragraphs are made more specific later in the complaint. In respect of the elimination of jobbers, Paragraphs 94 and 95 detail the charge; and in respect of manufacturing distributors, Paragraphs 108 to 111 detail the charge.

So far as the charge in respect of jobbers is concerned, it is true that Paragraph 94 charges, in terms, specifically acts of the defendant companies as distinguished from acts of intermediate persons such as Oakfield, but under the broad construction of the complaint taken by the majority of the Court, wherein it is held that the means and methods and details need not all be alleged, and  
3231 that the detail in the complaint does not limit the general charge, it would seem to be material to show



pressure upon Oakfield through the Kelley Plasterboard Company, the pressure originating in the defendants, and it would seem to be material to show under the charge with respect to manufacturing distributors, where, in those paragraphs, 108 to 111, the defendants are charged with themselves bringing pressure upon manufacturing distributors to resell at bulletin prices—to indicate that there was pressure upon Oakfield.

Now we reiterate the ruling that we do not receive in evidence the declaration of Oakfield, nor of Hansen and Eldred as officers or agents of Oakfield, as the declarations of co-conspirators, and we do not receive the acts of Oakfield or its officers as the acts of co-conspirators, binding upon other co-conspirators, for the reason that Oakfield is not charged with being a co-conspirator.

But we do receive the declarations of Hansen and Eldred as showing the state of mind of Oakfield, or as tending to show the state of mind of Oakfield, as a link in the chain of alleged pressure brought upon Oakfield by the defendants through its relationship with the licensees, and particularly the Kelley Plasterboard Company.

The evidence is received subject to the connection which the Court has previously commented upon, that a conspiracy must first be shown. Also, it must be shown 3232 that the pressure originated in the defendants.

We rely upon the case of Lawlor v. Loewe, which we think is in point, and also the case of Magruder v. Montgomery, 33 Appeals (D. C.) 133.

We think that if the Government proves by other evidence that the defendants did have a policy and conspiracy to eliminate jobbers, or to compel manufacturing distributors to sell at bulletin prices, and if it can be shown that this manufacturing distributor, Oakfield, acted with knowledge of or in fear of that policy, in cutting off trade, that that would be evidence, or a circumstance tending to prove the effectiveness of the conspiracy, and would have some bearing on the monopoly charge, and that the state of mind, on this theory, would be an independent fact, that is to say, the state of mind of Oakfield, material in the case or in the chain of evidence in the case, and as such would be provable by the statements of the officers or agents of Oakfield, under Lawlor v. Loewe, and similar authorities, and under Section 1729 of Wigmore.

The motion to strike is therefore denied.

There is one other little point that I wanted to call to your attention, Mr. Bromley, which I perhaps should have called to your attention before this Witness Spease left.

In reading Exhibit 357 last night I noted that the next to the last paragraph on the third page states:  
3233 "Acceptance of this proposition, you will realize, puts your company in position to act during the duration of the contract as our selling agents."

I thought that perhaps needed some explanation, and I am sorry that I didn't call it to your attention before the Witness Spease left. I thought perhaps both sides might be interested in it. It seemed to me that that phrase was somewhat inconsistent with the theory that I understood the witness to be testifying under, with respect to his relationship with Oakfield, that he was buying outright from them. In fact, he answered a question that I asked him by stating that he did not take on consignment but bought outright. Perhaps it is of no materiality in the case, but I call it to counsel's attention because it struck my curiosity as I read that exhibit over. Perhaps it can be explained by Eldred or Hansen, if they are called to the witness stand, or perhaps there is no dispute at all but what this was not an agency but a mere outright purchase and sale relationship.

Mr. BROMLEY. As far as I am concerned I didn't go into it because it is my position that it was an outright purchase and sale, in spite of that provision.

Mr. STEFFEN. I think that is correct.

Justice STEPHENS. It may be that it is not important, but I thought I ought to call it to your attention since it struck the Court's attention.

3234 Mr. BROMLEY. May I say to the Court that as I understand the ruling just made, the Court does not mean to intimate that it is receiving this evidence as evidence of the truth of the facts therein stated?

Justice STEPHENS. It is not. It is not offered as such, as I understand it. At any rate it is not received as such.

Mr. BROMLEY. Thank you.

Mr. STEFFEN. I have a matter concerning Exhibit 233 which I would like to present. We are going to ask to be permitted to reoffer that and I am bringing it up now, your Honor, for the reason that we have prepared a memorandum on the matter, and I suggest that it be brought

up at the same time as Exhibit 324 is brought up on Monday.

Exhibit 283 is the Redfield memorandum, and it has to do with whether Mr. Dowd had authority to waive the privilege or not. The reason that we bring it up is that we have made something of an investigation, and it appears that Mr. Dowd was Vice President and Comptroller, at the time. I have some reluctance in stating this because Mr. Adams is not present, but our thought is that we would send him copies of our memorandum, and if it is agreeable to him we can take up both memoranda at the same time on Monday.

Justice STEPHENS. Which is the exhibit as to which the memorandum already presented by Mr. Adams, refers?

Mr. STEFFEN. Mr. Adams has moved to strike Exhibit 3235. Exhibit 324.

Justice STEPHENS. Exhibit 324 is the answer, and the memorandum of Mr. Adams presents the question as to whether or not it must be verified in order to be binding as an admission, or in any event, whether it states a mere conclusion.

I have forgotten about Exhibit 233. Please explain that a little further?

Mr. STEFFEN. That is the Redfield memorandum which he had sent to Certain-tyed concerning the Speer Patent, I believe, and the question was whether or not Certain-tyed had waived their privilege with respect to attorney-client matters, and the issue turned on whether or not Mr. Dowd had authority to —

Justice STEFFEN (interposing). Oh yes, this was the one that had to do with the grand jury proceedings.

Mr. STEFFEN. Yes, and Mr. Adams made the flat statement that Mr. Dowd was not an officer, and of course on that there was no authority to proceed, so we made no further argument. We now find that Mr. Dowd was an officer and we would like to re-offer the exhibit.

Justice JACKSON. How will you get past the barrier that the Witness Redfield had never talked to Dowd and couldn't recognize his voice.

Mr. STEFFEN. We have something in our memorandum, I think, which covers that.

Justice STEPHENS. How do you get past the barrier that the Court based its ruling—as the Court remembers—in part on the fact that the mere iden-

tification of a document before a grand jury did not constitute a waiver?

Mr. STEFFEN. We have two paragraphs also on that, your Honor.

Justice STEPHENS. Very well, we will consider your memorandum. You may re-offer Exhibit 233 on Monday, subject to Mr. Adams' convenience in replying, if he is not ready at that time, in view of his absence.

On the other matter, please have your memorandum ready on Monday. We will expect you to have it at that time. If you could present it earlier to us it will help the Court. If you could give it to us a few days before that, we would like to have a chance to read it, and then we can hear the argument on Monday.

Mr. STEFFEN. I will try to do so.

(Government's memorandum as to Exhibit 233 handed to Court.)

Justice STEPHENS. Is this the memorandum on Exhibit 233?

Mr. STEFFEN. Yes, sir.

Justice STEPHENS. Thank you.

I suppose it has become known to counsel that informally last night—and if it hasn't it must be made known now to counsel—Mr. Knuff presented to Judge Jackson and myself, after adjournment—Judge Garrett was away—the

difficulty he was in with respect to his witness 3237 Sensibar. Mr. Sensibar had a Mexican Government contract appointment in Mexico City which he had to fulfill on Saturday, and if he was put on today we would have had to again discommode Mr. Tomkins. Therefore the Court excused Mr. Sensibar so that Mr. Tomkins could go on promptly tomorrow. But it left the Government without witnesses for this afternoon. Therefore we are bound to adjourn at this time.

The Court took the responsibility of excusing Mr. Sensibar because it seemed unfair to hold him, when he can come back later, and we did not want to again discommode Mr. Tomkins.

So the Court regrets the necessity of it, but we will have to adjourn now until tomorrow morning at ten o'clock.

(Whereupon, at 12:00 o'clock, noon, the hearing was recessed until Thursday morning, February 10, 1944, at 10:00 o'clock.)



3238 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., THURSDAY, FEBRUARY 10, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

Thereupon, FREDERICK TOMKINS, a defendant  
3242 herein, called as a witness by the United States, having been first duly sworn, testified as follows:

Justice STEPHENS. Mr. Tomkins, have you been on the witness stand before?

The WITNESS. Yes, sir, I was on the stand when this case was tried before.

Justice STEPHENS. I assume you are familiar with the practices of the court room. You should, as far as you can, answer just the question and only the question which is asked you, since counsel will direct the questions to the issues in the case. Where questions can be answered fairly "yes" or "no", you should answer them in that manner. Of course, you are not forbidden to protect yourself where you can't answer fairly in that way.

If you see the non-examining counsel rise to make an objection, just halt your answer until the objection is made so that the Court will have time to make a ruling.

The WITNESS. Yes, sir.

Justice STEPHENS. Proceed, Mr. Steffen.

DIRECT EXAMINATION by Mr. STEFFEN.

Q. State your full name, Mr. Tomkins, please?

3243 A. Frederick Tomkins.

Q. And where do you reside, Mr. Tomkins?

A. West Orange, New Jersey.

Q. You spell "Tomkins" without a "p", I believe?

A. Yes, sir.

Q. And were you at one time connected with the Newark Plaster Company?

A. Yes.

Q. Are you now connected with them?

A. Yes.

Q. What is your position?

A. President of the Newark Plaster Company.

Q. Where are they located?

A. Newark, New Jersey.

Q. Are the Newark Plaster Company and yourself defendants in the present action?

A. I believe we are.

Mr. STEFFEN. I call your attention to Rule 43(b), which provides that a defendant may be called as if upon cross-examination, and we are calling this witness as if upon cross-examination.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. What business is the Newark Plaster Company in, Mr. Tomkins?

3244 A. The Newark Plaster Company is in the business of manufacturing white plaster, and gypsum board products, and a few miscellaneous items.

Q. By "white plaster", what do you mean?

A. Plaster of Paris.

Q. Do you make ordinary plaster for walls?

A. What do you mean by "ordinary"?

Q. Ordinary neat plaster.

A. We do not manufacture neat plaster.

Q. Do you make sanded plaster which is ordinarily used

by building contractors?

A. No, we do not.

Q. Simply white plaster?

A. Simply white plaster.

Justice GARRETT. Will the witness kindly raise his voice a little? It is difficult for me to hear.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. How long has the Newark Plaster Company been in that business of making white plaster?

A. Since 1911.

Q. And was that the date when the Newark Plaster Company was incorporated?

A. Yes.

Q. In what State?

3245 A. New Jersey.

Q. And what was the predecessor company, if any?

A. The Newark Lime & Cement Manufacturing Company.

Q. How long had that been established, Mr. Tomkins?

A. That was chartered in 1840.

Q. It was a corporation?

A. It was.

Q. And the Newark Plaster Company is a direct successor, is that correct?

A. That is correct.

Q. All during that 104 years, your company has been selling plaster?

A. No, sir. We have been manufacturing white plaster since, I think, about 1854 or 1860.

Q. And from then on, you have been selling plaster?

A. Yes, we have sold what we have manufactured at all times, of course.

Q. Does your company sell directly to the dealer trade?

A. No, it does not.

Q. Did it at any time sell directly to the dealer trade?

A. I don't think the Newark Plaster Company has at any time sold directly to the dealer trade.

Q. What is the Calvin Tomkins Company?

3246 A. That is a wholly-owned subsidiary of Newark Plaster Company.

Q. Is it a corporation?

A. Yes, organized under the laws of the State of New York.

Q. And when was it incorporated?

A. I would have to look that up.

Q. Do you know approximately?

A. No, I would have to guess. It was around 1910 or 1912, I believe.

Q. It is a matter of record, and the exact date I don't believe is important at the moment.

Now are you an officer of the Calvin Tomkins Company?

A. Yes, sir.

Q. What office do you hold with that company?

A. Vice President of Calvin Tomkins Company.

Q. And it has sold all of the white plaster that your company has made for many years, is that correct?

A. That is correct.

Q. And since your company, the Newark Company, has made board, it has also sold the board which the Newark Company made, is that correct?

A. Yes, since the Newark Company made board, it has been sold by the Calvin Tomkins Company, or to the Calvin Tomkins Company.

3247 Q. I don't want to go into the details as to how you sold it, but it has sold the board which Newark has made?

A. That is correct.

Q. At what time did the Newark Plaster Company commence making board?

A. I think the date is January, 1939.

Q. Is that the date that you took over or merged with the Kelley Plasterboard Company?

A. Yes, sir, the Newark Plaster Company merged with the Kelley Plasterboard Company on January 3, 1939.

Justice STEPHENS. 1929?

The WITNESS. No, 1939.

By Mr. STEFFEN.

Q. And prior to that, had the Newark Plaster Company obtained the stock of the Kelley Plasterboard Company?

A. Yes.

Q. And do you recall what date you purchased that stock?

A. That stock was purchased May 1, 1937.

Justice STEPHENS. The transaction of 1939 was an acquisition of the assets?



The WITNESS. It was a merger of the two companies.

By Mr. STEFFEN.

Q. Prior to January 3, 1939, and on May 1, 1937, you had acquired the stock —

3248 A. (Interposing). The Newark Plaster Company had.

Q. (Continuing.) —of the Kelley Plasterboard Company?

A. Yes.

Q. At the time that you acquired the stock of the Kelley Plasterboard Company, did you have any negotiations with the United States Gypsum Company?

A. Did the Newark Company?

Q. Yes.

A. Yes, it did.

Q. I have here a contract which I will show you, which purports to be an agreement made on the 29th day of April, 1937, between the United States Gypsum Company, the Kelley Plasterboard Company, and the Newark Plaster Company.

Mr. STEFFEN. That is Government's Exhibit 362 for Identification.

Justice JACKSON. Is that in this set of exhibits?

Mr. STEFFEN. No, it isn't, Your Honor. There will be two or three exhibits that we didn't get photostated, by mischance. I don't think there is anything very crucial on this.

Justice JACKSON. No, I was just wondering. It was curiosity, that is all.

Justice GARRETT. This is Exhibit 362?

Mr. STEFFEN. Yes, Your Honor.

3249 (The document referred to was marked as Government's Exhibit 362 for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 362, Mr. Tomkins?

A. I have.

Q. And do you recognize the signatures?

A. I do.

Q. The first one is W. L. Keady?

A. That is right.

Q. And Mr. S. J. Kelley?

A. Right.

Q. And your own signature as President of the Newark Plaster Company.

A. That is right.

Q. Do you recall where this contract was signed?

A. No, I don't recall.

Q. Where were your negotiations with USG carried on, where did they take place?

A. They were carried on by our attorney, and I believe by correspondence.

Q. Did you ever talk with Mr. Keady?

A. Did I ever talk with Mr. Keady?

Q. At or about the time this contract was signed.

3250 A. Yes, I believe I did.

Q. Do you know whether it was in Chicago or Newark or New York, or where?

A. I don't recall. It might have been by telephone. I don't believe it was in Chicago. It might have been in New York.

Q. Did you advise him that you were buying the stock of the Kelley Plasterboard Company?

A. Well, I don't recall whether I advised him or whether he received the information from the attorneys.

Q. Did Mr. DeWitt handle that matter for you?

A. Mr. DeWitt handled that matter for our company, yes.

Q. Before you bought the stock of the Kelley Plasterboard Company, did you have certain conferences with Mr. S. J. Kelley?

A. Yes, I had many conferences with Mr. Kelley.

Q. Where did they take place?

A. They took place in New Jersey, in Mr. Kelley's office or in the office of our company.

Q. And did you acquaint yourself with the affairs of the Kelley Plasterboard Company?

A. We did.

Q. Did you know that they were operating under a license from the United States Gypsum Company?

3251 A. Yes, sir.

Q. Did you examine that license?

A. We did.

Q. And did you look over the books and papers of the Kelley Plasterboard Company?

A. We did.

Q. After you—and by “you”, now, I mean Newark—

after Newark bought the stock of the Kelley Plasterboard Company, was there any change in the management of the Kelley Plasterboard Company?

A. Well, Mr. Kelley, who had been President, resigned and was no longer connected with the company.

Q. He took no further active part?

A. He took no further active part in the business.

Q. And who became President?

A. I became President of the Kelley Plasterboard Company.

Q. Who were the other officers, if you remember?

A. I am not sure. I would have to refer to the records.

Q. Mr. Miles was Treasurer?

A. Yes.

Q. Was he also connected with the Newark Plaster Company?

A. Yes, he was also Treasurer of Newark Plaster Company.

Q. And Mr. Villiard?

A. Mr. Villiard was an officer, he was Secretary or Assistant Treasurer, I am not sure which.

Q. Secretary, I think you testified before.

And Mr. Calvin Tomkins, Jr.?

A. I believe he was also an officer.

Q. And was he also an officer of Newark Plaster Company?

A. He was.

Q. Now as to the directors, do you recall who were directors of the Kelley Plasterboard Company after you purchased the stock?

A. The officers of the company were directors, and I don't recall whether there were any other directors.

Q. And were they also directors of Newark?

A. I am not sure that all of them were. There were directors in common, but all of the directors of one company were not directors of the other company.

Q. Well, now, were you actively in charge of the affairs of Kelley after you became President?

A. I was.

Q. And concerned yourself with the general details of the business, that is, the policy-making operations?

A. Well, I concerned myself with as few details as possible.

Q. During this period from May 1, 1937, to Jan-

uary 3, 1939, I take it, the Kelley Plasterboard Company was making board, is that correct?

A. That is correct.

Q. And was the Calvin Tomkins Company selling the board made by the Kelley Plasterboard Company?

A. No, sir.

Q. So during that period the plaster made by the Newark Company was sold by Calvin Tomkins?

A. That is correct.

Q. And the board made by Kelley Plasterboard was sold by Kelley Plasterboard?

A. That is right.

Q. Did they sell to the same customers?

A. Oh, they sold to some customers, they sold board to some customers who also purchased white plaster from the Calvin Tomkins Company. They sold board to many customers who did not purchase white plaster.

Q. Well, now, you have testified that on January 3, 1939, the two companies merged?

A. That is right.

Q. I want to show you Government's Exhibit No. 363 for Identification, which purports to be a contract between the Kelley Plasterboard Company and the 3254 Newark Plaster Company, under date of the 16th of December, 1938, and ask if you can identify that?

Mr. STEFFEN. This, Your Honors, is the first contract in the file that you have there.

(The document referred to was marked as Government's Exhibit No. 363 for Identification.)

By Mr. STEFFEN.

Q. Do you recognize the signatures to Government's Exhibit 363?

A. I do.

Q. I notice that Mr. Villiard had become President at this time.

A. It shows that he was Vice President on my copy.

Q. It shows, on my copy, the "Its" stricken out.

A. I don't know which he was at that time.

Q. And the next signature is that of yourself?

A. That is right.

Q. I now want to show you Government's Exhibit 364, which purports to be a copy of a contract between the



United States Gypsum Company and the Newark Plaster Company, under date of January 3, 1939, and ask you to examine that and state whether or not you recognize the signatures?

(The document referred to was marked as Gov-  
3255 ernment's Exhibit 364 for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 364, Mr. Tomkins?

A. I have.

Q. And are the signatures genuine?

A. Yes, I identify the signatures.

Q. Do you recall having had any conversation with Mr. Keady at the time this contract was signed?

A. Yes, I discussed this with Mr. Keady before the contract was drawn.

Q. Where, at Newark or Chicago, or where?

A. I think we met in Mr. DeWitt's office in New York, and subsequently in Mr. MacLeish's office in Chicago.

Q. And what did you state to Mr. Keady in your conversations?

Mr. BROMLEY. I object to this as immaterial and incompetent because merged in the contracts.

Justice STEPHENS. Do you wish to be heard on that, Mr. Steffen?

Mr. STEFFEN. No, Your Honor. I can rephrase the question and make it simpler, perhaps.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. Did you discuss with Mr. Keady the purpose  
3256 of your merger with the Kelley Plasterboard Company?

Mr. BROMLEY. That calls for a "yes" or "no" answer, I assume, if the Court pleases.

The WITNESS. May I have that question again?

By Mr. STEFFEN.

Q. Did you discuss with Mr. Keady at either of these conversations the purpose of your merger with the Kelley Plasterboard Company?

A. The purpose of the merger?

Q. Yes.

A. I don't recall that we did discuss that.

Q. Well, was there any discussion concerning the reasons for your transaction with the Kelley Plasterboard Company?

A. I have no recollection of discussing our reasons. We were interested in finding out whether the United States Gypsum Company would have any objections. We believed we had the right under the original license agreement to do this, but our attorneys felt it was advisable to check with the United States Gypsum Company before we actually made the assignment. This transaction was handled by the attorneys rather than by Mr. Keady and me.

Q. But you were present at the —

A. (Interposing.) I was present, yes.

Q. And did they have any objections?

3257 A. They gave us their consent.

Q. Did they state any objections?

A. Not that I recollect, no, sir.

Q. What did you have in mind that they might object about?

A. We didn't know. That was our reason for approaching them.

Q. You didn't know whether they would have any objections at all or not?

A. That is right.

Q. Did the matter of sales by the Calvin Tomkins Company come up in that discussion with Mr. Keady?

A. Yes, it did.

Q. And what was the discussion?

Mr. BROMLEY. I object to that as immaterial. That question raises, I believe, a very important objection to this line of testimony and to these documents, if and when they are offered. Since it comes up this way, I think I had better state my position, with the Court's permission, now.

To the extent that this question calls for an answer for the purpose or with the effect of attempting to show, on the part of the Government, that there was anything illegal about Newark Plaster Company agreeing with USG

3258 that its wholly-owned subsidiary, Calvin Tomkins, which was merely the selling end of the Newark business, would be bound by the provisions of the license between USG and Newark, it seems to me that the matter is immaterial and irrelevant. Obviously the Newark Plas-

ter Company, upon becoming a licensee, could not defeat the provisions of the USG license by selling the patented product through its wholly-owned subsidiary and claiming that the subsequent sale by that subsidiary was a second sale or a resale and therefore not subject to the price restrictions in the license.

This question and the documents which will be offered in connection with it, I assume, merely spell out the rights and liabilities of the parties that the law would imply even if the formal agreements had not been drawn. The business of the Calvin Tomkins Company, that company being a 100 per cent owned subsidiary of the Newark Plaster Company, was under the complete control of the Newark Plaster Company by reason of stock ownership, substantial identity of officers and directors, and there could therefore be no restraint of trade while the patented product was still owned and controlled by the parent company.

The Government has already admitted this, and in the criminal case, in response to this objection by me, specifically stated that it did not contend that there was anything unlawful about this agreement or arrangement  
3259 which required Newark's wholly-owned subsidiary to be bound by the provisions of the license, so far as the sales by that subsidiary were concerned, of the patented board made by Newark.

Mr. STEFFEN. Do you have the page of the transcript where that alleged admission is supposed to be?

Mr. BROMLEY. I have.

Mr. STEFFEN. It is page 886, I believe.

Mr. BROMLEY. Page 939. During my cross-examination of this witness, I asked this question, at page 938, of this witness:

"Q. Didn't you have a discussion with the lawyers about the matter of whether or not this transaction couldn't take the form of an agreement by Calvin-Tomkins expressly to charge, as to resale prices, those fixed by Newark ——"

Then I was interrupted by the Court, who said:

"Just one minute, Mr. Bromley. That wouldn't throw any light on the inquiry because it seems that the Government and defense, both, agree that as the Calvin-Tomkins was a wholly-owned subsidiary the Government is raising no question about the control of the Calvin-Tomkins Company so your question doesn't raise the point at issue at all.

"Mr. BROMLEY. I didn't appreciate that the Government was raising no question about it.

"The COURT. That is my understanding.

"Mr. KELLEHER. You were at the bench this 3260 morning, Mr. Bromley.

"The COURT. Sir?

"Mr. KELLEHER. That is correct, your Honor, you stated it this morning.

"The COURT. That is my understanding."

Mr. STEFFEN. Well, if we are going to raise this discussion, I suppose we may as well go into it right now, Your Honor.

I want to call Your Honors' attention also to the discussion which was had at the bench in the morning, and to which this particular reference applies.

On page 886, the Court said—this is Judge Goldsborough:

"I want to learn a little law. I am sure you gentlemen can furnish the law.

"Is it agreed between counsel for the defense and the Government counsel that licensors and licensees were protected in their control of the price made by their wholly owned subsidiaries?

"Mr. KELLEHER. I can explain that in this way: In the indictment we charge that sales, the control of the selling price of Calvin Tomkins was illegal, and made no reference to that charge in the opening to the jury. I am now prepared to tell the Court that we do not intend to press that as illegal because the question is a doubtful legal question." 3261

Now that doesn't contain any concession of the sort that Mr. Bromley is stating here, nor do I find anything in the subsequent colloquy between Mr. Bromley and the Court which affects us at this point.

Perhaps I should very clearly state what our position is here. We expect to show that the Newark Plaster Company has been selling its goods to the Calvin Tomkins Company, which operates in New York—is that not correct, Mr. Tomkins?

The WITNESS. Its operations are not limited to New York.

Mr. STEFFEN. But that is its principal place of business?

The WITNESS. It has its office in New York.



By Mr. STEFFEN.

Q. And the Newark Plaster Company's office is in Newark?

A. That is right.

Q. And the Calvin Tomkins Company is a wholly-owned subsidiary?

A. That is correct.

Q. Now do you sell to the Calvin Tomkins Company?

A. The Newark Plaster Company sells to the Calvin Tomkins Company.

Q. Those are outright sales?

3262 A. Those are sales, made in New Jersey, yes.

Q. And the Calvin Tomkins Company in turn sells out to the dealer trade?

A. That is right.

Mr. STEFFEN. We are not charging here that there is any illegal control of the resale price by the Calvin Tomkins Company. Our charge is the very broad charge that the prices which are charged to dealers by all of these defendants are uniform. We wish to put in this evidence to show what the actual situation is between Kelley at the time, Newark, and Calvin Tomkins; and until we get it before Your Honors, it is hardly possible to rule exactly what the situation is.

The next exhibit which I think I should present to you will perhaps clarify the issue a little more, and I would like to do that; and then I would like to be heard further in response to Mr. Bromley's contention.

Justice JACKSON. How is it material if you say it is not illegal?

Mr. STEFFEN. It is very material, Your Honor, because I think there is a very definite question of whether the matter comes under the license agreement. In other words, it is a matter of defense. Mr. Bromley's whole defense, as I see it, here has been that the license agreements give him, or the United States Gypsum Company, the  
3263 right to fix prices. That is defense. If we can show that any substantial amount of board is sold outside of that shelter of the license agreements, then to that extent his defense is washed away. And in this case it will be our very definite contention that the board sold by Newark to Calvin Tomkins, as Mr. Tomkins just told you, is not under the protection of the license agreement.

We don't charge that that is illegal, but we do say that it doesn't have the defense which Mr. Bromley is going to claim for it. What we are saying is illegal in this case — and that is all we have ever said—is that the control of prices to dealers by these defendants has been uniform and has constituted a restraint of trade. And that, I think, makes a complete charge of dominating and controlling the sale and distribution of board throughout the area.

Now let's make this point very clear. Merely 3264 because the defendants choose, between themselves, to treat Newark and Calvin Tomkins as one, certainly doesn't make them one. But I will also say that if they see fit to treat each other as one, we are entitled to offer the evidence upon the assumption which they make. Both of them say that they are one, that is, both Newark and United States Gypsum Company say that Calvin Tomkins and the Newark Plaster Company are one organization, and if so, it is simply a sale by one organization. That is their contention.

Our contention is that it doesn't necessarily make them one, and we want to lay the facts before this Court to decide whether they are or are not, for purposes of determining whether the license agreement gives them the protection which they are going to claim for it.

The next exhibit will show, I think, what I have in mind.

By Mr. STEFFEN.

Q. I would like to show you —

Justice STEPHENS (interposing). Before you do that, Mr. Steffen, state briefly what the effect of each of these agreements you have introduced or presented, so far, is. The first one is Exhibit No. 362.

Mr. STEFFEN. The first agreement, Exhibit 362, was to show the general consent on the part of United States Gypsum Company to the acquisition by Newark of the Kelley plasterboard stock, and it also contains some provisions, some warranties, on the part of the United 3265 States Gypsum Company as to what claims, if any, they may have against Kelley on account of back royalties.

Justice STEPHENS. Did you say "warranties"?

Mr. STEFFEN. Yes, I think that is correct.

Mr. BROMLEY. Isn't all that Exhibit 362 is, what is sometimes known as an estoppel certificate?

Mr. STEFFEN. I think that is correct.

Mr. BROMLEY. So that when Newark bought the stock of Kelley, it could have a binding statement from United States Gypsum, who had this important contract with Kelley, that Kelley was not in default, and did not have any undisclosed liabilities to United States Gypsum.

I think that is all there is in it except that on page 3 there is a reference which bears on this question, in paragraph 3, a little below the middle:

"Without in any way limiting the generality of the foregoing, it is expressly agreed that any sale by Newark or by any subsidiary or affiliated company, of materials or products manufactured or sold by Kelley and embodying any of the inventions and improvements which are covered by or included within the provisions of said license agreements, or either of them, and any dealings of any kind in any such materials or products by Newark or by any subsidiary or affiliated company, shall, at the option of 3266 Gypsum (that means United States Gypsum Company) be deemed to be the act of Kelley for all purposes of said license agreements; PROVIDED, HOWEVER, that nothing herein contained shall be deemed or construed to give Kelley the right to sell or otherwise dispose of such materials or products in any way to Newark, except upon the prior written content of Gypsum as provided in said license agreements."

Justice STEPHENS. What is Government's Exhibit 363?

Mr. STEFFEN. Government's Exhibit 363, your Honor, is simply an agreement between Kelley and Newark, constituting the agreement of merger.

Then Exhibit 364 is a further agreement between United States Gypsum Company and Newark, consenting to the merger and stating certain conditions regarding the sale of board by the Newark Plaster Company.

I might say that Exhibit No. 364 is already in evidence.

Mr. BROMLEY. I don't think that summary is right at all.

Exhibit 363, which you offered in evidence, is a three-page document which is merely an assignment, and nothing else, of the license agreement by the Kelley Plasterboard Company to the Newark Plaster Company, dated December 16, 1928.

Justice STEPHENS. It seemed to the Court that that is what it was, as the Court read it.

Mr. STEFFEN. I think that is correct, your Honor.

Justice STEPHENS. It isn't an agreement of  
3267 merger, is it?

Mr. STEFFEN. No, but it is one of the agreements in connection with the merger.

Justice STEPHENS. I had understood you to say it was an agreement of merger.

Mr. STEFFEN. If I did, I did not mean that.

Mr. BROMLEY. It is a simple assignment.

Justice STEPHENS. Of the license agreement.

Mr. BROMLEY. Yes, your Honor. That exhibit, standing by itself, is probably material. For what it is worth, it shows that Newark got a license by the assignment route.

The next exhibit, No. 364, is the January 3, 1939, agreement, which, in paragraph 3, on page 3, raises the question which I have been arguing.

Justice STEPHENS. What is the purport of the whole agreement, Mr. Bromley?

Mr. BROMLEY. The purport of the whole agreement is that United States Gypsum consents to the assignment to Newark of the Kelley license. Newark agrees to be bound by the license, and in case Newark shall make its sales through a subsidiary, as it intended to do, then this agreement provides that the sales or acts of such subsidiary shall, for all purposes of the license agreement, be construed as the sales or acts of Newark, as such licensee, and Newark shall be responsible therefor.

Here was a somewhat unusual situation when  
3268 Newark, a manufacturer, didn't sell anything; for some reason of its own, and I think Mr. Tomkins will tell us that that reason was a tax reason, it had a 100 per cent owned subsidiary which acted as its selling agency. I mean by that, that its 100 per cent owned subsidiary performed the entire selling function for Newark, Newark did not sell anything to any customer. It transferred all of its products to the Calvin Tomkins Company.

Now it did that by way, as Mr. Tomkins has said, of a sale, for tax reasons. It didn't want Calvin Tomkins, for tax reasons, to be an agent, because then the separation wouldn't have done any good, tax-wise. It wanted to maintain the form of purchase and sale, and when we were confronted with that, we said, "Well, how is our license going to be observed if Newark is going to do the selling through this instrumentality?"



I suppose we might have rested on the doctrine of "piercing the corporate veil", if we had wanted to, and I suppose that we could have successfully contended that no licensed manufacturer could avoid the provisions of a license by forming a 100 per cent owned subsidiary and selling all of its products to that subsidiary, and letting it resell them. That would be a clear evasion, and I suppose any court would hold the subsidiary to be an instrumentality for the purpose of the license agreement.

So, in order to make the situation clear, this 3269 agreement was entered into; and I still insist, when it was called in the criminal case and explained this way to the court there, that my reference to pages 938 and 939 shows that Mr. Kelleher, after he understood it, said, "That is correct—the Government makes no contention that the sale by Newark to Calvin Tomkins, and then the resale, with the price control still attaching, is illegal". And I think it plainly was not illegal.

Justice STEPHENS. What is the next agreement you wish to explain to the Court—so we will have this matter fully before us.

Mr. STEFFEN. I should like to show you, Mr. Tomkins, Government's Exhibit 365 for identification, which purports to be a consent, under date of January 3, 1939, by the United States Gypsum Company, signed by Mr. Keady, that Newark could sell to the Calvin Tomkins Company.

Justice JACKSON. May I ask one question, Mr. Steffen?

Mr. STEFFEN. Yes.

Justice JACKSON. Is it your idea that if, as Mr. Bromley has argued, there was a concession on the part of the Government in the criminal case, that it is binding on the Government here?

Mr. STEFFEN. We would be willing to abide by it if it has been made. I don't know that we are required to, but I think that in good faith we should do that.

Justice STEPHENS. You are contending now that 3270 despite the concession, if there was a concession —

Mr. STEFFEN (interposing). I don't think there was such a concession—certainly not as Mr. Bromley construes it.

Justice JACKSON. And your thought is, that if there were such a concession, you are bound by it here?

Mr. STEFFEN. I am perfectly willing to be bound by what Mr. Kelleher said.

Mr. BROMLEY. Didn't you hear what he said when I read it?

Mr. STEFFEN. Just a minufe. I want to make it clear that in the criminal case, under the indictment there was only a very limited charge which had to do with control of resale prices by manufacturing distributors, and Calvin Tomkins Company was not a manufacturing distributor.

Mr. BROMLEY. You know that in the Bill of Particulars that Calvin Tomkins Company, in answer to our question, was designated as a manufacturing distributor—erroneously, that is true, but that is the way the point arose. So there was a definite charge on this Calvin Tomkins matter, both in the indictment and in the Bill of Particulars, and that is why we had the conference at the bench, and that is why I raised the point, and I never could get Kelleher at the bench to withdraw the charge, and it wasn't until my cross-examination at pages 938 and 939 that he finally withdrew it. But it was directly in issue under the indictment, as amplified by the Bill of 3271 Particulars.

Mr. STEFFEN. My point, prior to being interrupted, was that the Calvin Tomkins Company, as a fact, was not a manufacturing distributor. As Mr. Tomkins has said, they have simply sold, and were acting either as a selling agent for the Newark people, or they bought from the Newark people and resold.

The situation here is that Mr. Bromley would like to treat them as though they were a selling agent. The Newark Plaster Company has treated them as though they were a company to whom they sold, and then there was a resale.

I say that our position at this moment is that we are interested in the control of the price of board sold to dealers and we don't care, for the moment, whether it has been sold through Calvin Tomkins, as an agent, or sold to Calvin Tomkins and resold to dealers. For the purpose of introducing this testimony, however, we are going to take Mr. Bromley's position, and say that they are estopped to deny, as I see it, both Newark and USG, that Calvin Tomkins and Newark are one and the same; whatever evidence of control there is certainly comes in.

On the other hand, when we come to final argument, and there is a question of whether or not Mr. Bromley's license

agreement covers and affords protection to sales of this character, we will argue very clearly that it does not. A

licensor may not, by virtue of just saying, "We have 3272 licensed A, and we are going to treat B as though A and B were one"—say that we can control in any fashion the resale price of B.

It seems to me that that type of transaction is completely out from under the license agreement. But it is not an issue at this moment.

For the purposes of this discussion, we are prepared to treat the Newark people and the Calvin Tomkins people just as both the defendants have, as though they were one company.

I want to point out, however, that Exhibit No. 365 very definitely says that they also had in mind the idea of selling, that is that Newark would sell to Calvin Tomkins. The first paragraph there says, "Which includes the right to effect sales of said gypsum plasterboard or gypsum wallboard to your said wholly owned subsidiary at a maximum discount of twelve and one-half per cent ( $12\frac{1}{2}\%$ ) from your regular price to your dealer trade f. o. b. mill."

Now it is subterfuge, one way or the other.

All that I ask is that the whole facts be presented to the Court, and I think it is the Court's decision, when the time comes, as to what the actual relationship is, and what the effect is to be.

I therefore now offer in evidence Government's Exhibit 362, 363, and 365. Exhibit 364 has already been admitted as Exhibit 16.

Mr. BROMLEY. I renew my objection to all of them 3273 on the ground that they are immaterial and incompetent, and move to strike Exhibit 16.

In that connection it seems to me it might well be that these documents would have some materiality as showing the general situation, and all I am trying to get from Government counsel is a statement whether, in connection with the offer of this testimony, he is going to claim, and therefore is offering these exhibits to prove, that the sale by Calvin Tomkins of patented gypsum board was unlawful because it was, in effect, a resale at prices unlawfully controlled by United States Gypsum?

I still don't know whether he contends that or not.

Justice STEPHENS. Well, it seems to the Court that he is contending that it is illegal, and that is what he intends

to contend at the close of the case, and yet he states that he is willing to abide by the concession that it was not illegal, if there was a concession to that effect made on the criminal trial.

Mr. STEFFEN. The concession was not that broad.

Justice STEPHENS. I said "if there was a concession."

The Court thinks it ought to read the material at pages 938 and 939 in the criminal proceeding, and also the material referred to by Mr. Steffen at page 886.

Will you hand them to the Marshal, please, and let the Court take its usual morning recess and look at them? If it won't harm the record, mark where the material in question commences and ends, if you will?

Let the Court be in session for a moment. What do you say, Mr. Bromley, to Mr. Steffen's contention that the issues in the criminal case were much more limited than here, and therefore the concession may not be applicable?

Mr. BROMLEY. I say that both the indictment and the Bill of Particulars directly charged that the resales by Calvin Tomkins were illegal because they constituted the same kind of resale price fixing as was the heart of the indictment.

(A copy of the transcript of testimony in the criminal trial, containing the matter referred to by counsel, was handed to the Court.)

Justice STEPHENS. The first passage is at page 858?

Mr. BROMLEY. 886 is where Mr. Steffen quoted from.

Justice STEPHENS. 886 is one of them?

Mr. BROMLEY. Yes, beginning at line 6 and running to line 18.

Justice STEPHENS. What is the other?

Mr. BROMLEY. Page 938, beginning at line 13, and ending on page 939, at line 8.

Justice STEPHENS. Thank you. We will be in recess —

Mr. BROMLEY (interposing). May I, before the recess, call your Honors' attention to the fact that although Mr. Steffen has only marked a few lines on page 886, the discussion which we had at the bench runs over for several more pages.

Justice JACKSON. Subsequent to page 886?

Mr. BROMLEY. Yes, your Honor, right along, and the court took the view, strangely enough, that the thing was



illegal, but since the Government didn't press it, it went out of the case.

Justice STEPHENS. We will now be in recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. The Judges have read the material in the criminal record, the record of the criminal case, handed up by counsel, references to which are already in the court reporter's notes, and it seems to all three of us, Mr. Steffen, that there was a clear concession there by Mr. Kelleher that there was nothing illegal under the Sherman Act in respect of the sale by Newark through Tomkins, whether it was a wholly-owned subsidiary, agent, or what-not.

Since you have stated that you feel bound by that concession, it seems to us that that takes that issue out of the case.

We think, however, that these exhibits may be received in evidence to show the general relationship of all of the parties, subject to that concession.

That is the ruling of the Court.

The motion to strike Exhibit 16 is denied in order 3276 that the exhibit may remain in the record as Exhibit 364, for the purpose of showing the general relationship of the parties; otherwise it is in the record subject to the concession.

(The documents marked as Government's Exhibits Nos. 362 to 365, inclusive, were received in evidence.)

Justice STEPHENS. I might add that we have noted, Mr. Steffen, and considered your contention that the issues in the criminal case were more limited, but the charge in the criminal case, although it was limited to resale price fixing by manufacturing distributors, was nevertheless a charge of resale price fixing, that is the charge of the illegal fixing of prices to dealers; and that is the charge here. It seems to us that the concession is really on all fours with the situation here.

Mr. STEFFEN. If I might, I should like to make a very short statement.

We have visualized the complaint in paragraph 45 (a), as stating broadly a control of prices to dealers, and that is the principal charge which we find in the complaint. This is a control of dealers' prices.

In paragraph 45 (e), we say, "concertedly inducing and

coercing manufacturing distributors to resell," and so forth, and that is a separate type of restraint. That 3277 is, A can sell to B, and if he coerces B to resell at a given price, that is a restraint in itself.

If A sells to B at a fixed price, that is the type of restraint charged in paragraph 45 (a).

Now what we say as respects this testimony is that these exhibits are clearly admissible for purposes of showing a violation of 45 (a), a control of prices to dealers. All the board manufactured by Newark has been sold, and it would be a peculiar circumstance if they could get a wholly-owned subsidiary, and then sell through that and then say, "Well, as far as our control of prices to dealers is concerned, there is no violation." Of course, obviously that is a violation.

Now the narrow question of whether there was a control of the resale price of the Calvin Tomkins Company as being a company that had bought from Newark and then resold, is charged in 45 (e), and it does not apply to the Calvin Tomkins Company—we are agreed upon that. That is, we do not regard the Calvin Tomkins Company, for the purposes of this case, as a manufacturing distributor, which is what paragraph 45 (e) says.

But whether it is charged or isn't charged, I think it is essential that we get the evidence before the Court, as we have attempted, as to just what the relationship between the three parties is.

Justice JACKSON. Well, the Court has ruled that 3278 you may do that.

Mr. STEFFEN. And I think we should proceed on that score.

Justice STEPHENS. Well, the Court has ruled that you may show what the general relationship of the parties was for the purpose of the entire case, but the Court is of the view clearly that there was a concession in the criminal case that there was nothing illegal under the Sherman Act about the sale by Newark to or through Tomkins.

Mr. STEFFEN. I would like to draw this one distinction, that as I understood Mr. Kelleher, it was that he was not pressing it in that case. Secondly, that there is a difference between saying that it is illegal and saying that it is protected under the license agreements.

Mr. Bromley's defense, of course, is that this board was sold under the license agreements, and that the General

Electric case permits them to fix prices, resale prices, or prices of any sort. Whether or not this is the type of case contemplated in the General Electric case I very gravely doubt, and wish to reserve the privilege of arguing that at the conclusion, as a matter of law.

Justice STEPHENS. Well, the Court isn't ruling now on the question of whether or not the license agreements were used as the Government charges, as a cloak, or were used in a manner which takes them beyond the purview of the ruling of the Supreme Court in the General Electric case.

Of course there is a distinction between what might be legal between the parties to a license agreement, as to who would be bound by it, as to whom it might be said to apply—that is a private agreement that can be entered into by the parties to license agreements—and, on the other hand, the question of whether or not those arrangements violate the Sherman Act.

But the point that it seems to us the Government has bound itself on is that the Government, knowing in the criminal case, as it knows here, what these contracts between these parties were, the United States Gypsum Company, the Newark Company and the Tomkins Company, nevertheless conceded that so far as the Sherman Act was concerned, there wasn't a violation of law, at least the Government was not going to contend that there was a violation of law in the sale by Newark to or through Tomkins.

Mr. STEFFEN. I think that it was the latter that the Government was not there contending, and as I have explained we are not here contending that that is a direct violation.

What we are contending is that it is not protected under the license agreements.

But I will proceed with the examination.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. I now wish to refer you, Mr. Tomkins, to 3280 Government's Exhibit 365, the next to the last paragraph thereof, stating, "It is agreed that this consent may be withdrawn by us at any time, by giving you written notice to that effect".

Are you familiar with that?

A. Yes.

Q. And it was your understanding that the United States Gypsum Company could withdraw their consent at any time?

A. Yes, we signed this agreement.

Q. And is that the usual way that they gave you consent to sell through manufacturing distributors?

Mr. BROMLEY. I object to that as calling for a conclusion, and as incompetent.

Mr. STEFFEN. I am asking for the practice, your Honor, as to whether they ordinarily conditioned their consent by the proposition that it could be withdrawn by them at any time.

Justice STEPHENS. Well, if the objection is insisted upon, it does seek a legal conclusion. The question of what method they used in providing for a consent or withdrawal of consent would have to be shown by each contract. The witness cannot testify to the general practice. That is a legal conclusion. The objection is sustained.

By Mr. STEFFEN.

Q. Is it your understanding that the United States Gypsum Company could withdraw its consent not only with respect to your sales to Calvin Tomkins, but with  
3281 respect to your sales to any other manufacturing distributor?

A. I would have to see those consents to answer that question.

Q. At the time, Mr. Tomkins, that Newark took over the Kelley Plasterboard Company, did you have any discussions with Mr. Kelley concerning sales to so-called manufacturing distributors?

Justice STEPHENS. Will you read that question?

(Thereupon, the pending question was read by the reporter.)

By Mr. STEFFEN.

Q. Do you know what I mean by the term "manufacturing distributors"?

A. Yes, I think I am clear on that.

Q. Now will you answer my question?

A. Prior to the time we took over the Kelley Plasterboard Company I had had discussions with Mr. Kelley in



the course of which he had disclosed the agreements or understandings he had with some of the so-called manufacturing distributors to sell them board.

Q. And what was your understanding of that arrangement, or of those arrangements?

Mr. BROMLEY. Were they in writing, may I inquire, if the Court pleases?

The WITNESS. I am not sure that they were, Mr. 3282 Bromley. I know that Kelley was selling, prior to our acquisition of the company, certain manufacturing distributors. Whether it was a matter of written contract or not, I don't know.

Justice STEPHENS. By a "manufacturing distributor", you mean, I assume, Mr. Tomkins, a person or company who made plaster but bought board and then sold both of them?

The WITNESS. That is right.

By Mr. STEFFEN.

Q. Could you name the distributors that Kelley was selling to when you took over the Kelley Plasterboard Company?

A. Kelley was selling to the Oakfield Gypsum Products Company, the Paragon Plaster Company, and the Structural Gypsum Company.

Q. Were they selling to the Connecticut Adamant Plaster Company at that time, do you remember?

A. No, I do not think they were.

Q. Now what did Mr. Kelley say to you concerning those transactions?

A. Well, I don't remember specifically what he said to me as to any of those transactions. The understanding I had —

Mr. BROMLEY (interposing). Just a moment, I object to his understanding, if the Court pleases.

Mr. STEFFEN. I insist upon his understanding, your Honor. Mr. Tomkins has purchased the Kelley 3283 Plasterboard Company and his understanding is very relevant as to that type of business.

Justice STEPHENS. The question is not as to its relevancy, but as to its competency.

You are not required or expected to remember, Mr. Tomkins, the very words which you said or exchanged with Mr. Kelley.

The WITNESS. I understand that.

Justice STEPHENS. If you can remember the substance and effect of the conversations, you should state that. But if what you mean is exactly what you say, that you don't remember the substance and effect of the conversations, but that you remember only what your understanding was, in the sense of an inference from them, that is not competent.

Do you remember the substance and effect of the talks you had with him?

The WITNESS. Yes, I remember the effect, I don't remember the conversations.

Justice STEPHENS. Tell what the substance and effect were.

The WITNESS. Simply that Kelley had arrangements with these manufacturing distributors for which he had secured consents from the United States Gypsum Company, and which permitted him to sell under the license agreements to these companies at certain discounts.

By Mr. STEFFEN.

Q. The discounts were  $12\frac{1}{2}$  and 15 per cent?

A.  $12\frac{1}{2}$  per cent for lath, and 15 per cent for 3284 wallboard.

Q. Did he state whether that was good business or not? It provided an additional tonnage, did it?

A. It increased his volume of sales, yes.

Q. And was it your understanding that the manufacturing distributors would resell at any given price?

Mr. BROMLEY. I object to that as incompetent.

Justice STEPHENS. Will you read that?

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Well, I believe, Mr. Steffen, that that is incompetent.

By Mr. STEFFEN.

Q. Did you have any conversation with Mr. Kelley as to the price at which the manufacturing distributors would resell?

A. I don't recall any such conversation, no, sir.

Q. And what was your understanding?

Mr. BROMLEY. Same objection.

Justice STEPHENS. The objection is sustained.

By Mr. STEFFEN.

Q. In this period between May, 1937, and January 3, 1939, did you write to the United States Gypsum Company for further consents, do you recall?

A. I believe such letters were written. Whether I wrote them or not, I don't know.

3285 Q. I show you now Government's Exhibit No. 366 for identification, which purports to be a copy of a letter, under date of July 8, 1937, addressed to the United States Gypsum Company, and signed G. A. Wileman.

Justice JACKSON. Is that in our file here?

Mr. STEFFEN. Yes, if you will just skip one.

Justice STEPHENS. That will be what number, Mrs. Gillette?

Mrs. GILLETTE. Exhibit 366.

By Mr. STEFFEN:

Q. Who is Mr. G. A. Wileman, if you know?

A. Mr. Wileman was the office manager of the Kelley Plasterboard Company.

Q. Is he still with your company now?

A. No, he is not.

Q. Do you recognize that letter as a copy of a letter that Mr. Wileman sent to United States Gypsum Company?

A. I cannot recognize this letter, it has no signature or identifying marks, but I believe such a letter was sent.

Q. Now I want to show you Government's Exhibit No. 367, which purports to be a carbon copy of a reply to the letter of July 8, 1937, this letter being addressed to Mr. Fred Tomkins, under date of July 14, 1937.

Do you recognize that letter?

A. The same answer applies as to the last letter. It is unsigned. I believe this letter was received.

3286 Q. I now show you Government's Exhibit 368 for identification, which purports to be a copy of a letter signed by you, addressed to Mr. Keady, under date of July 21, 1937.

Do you recognize that, Mr. Tomkins, as a copy of a letter which you sent Mr. Keady?

A. Yes, I recognize that.

Q. Do you recall whether you got consents from Mr. Keady to sell to the Structural Gypsum Division of the American Cyanamide & Chemical Company, and the Oakfield Gypsum Products Company, as requested in the letter?

A. Yes, we did receive those consents.

Q. I now want to show you Government's Exhibit No. 369, which purports to be a letter, or rather, a copy of a letter, signed by you, addressed to United States Gypsum Company, under date of September 23, 1938, and ask if you can identify that letter.

I have shown you, I find, the carbon copy. I also have the original and I would like to show you that. This is the original of Government's Exhibit No. 369.

Justice STEPHENS. Do you wish to substitute it for the copy?

Mr. STEFFEN. Yes; I do.

Justice STEPHENS. Then withdraw the copy, Mrs. Gillette, and return it to counsel, and mark the original as Government's Exhibit No. 369.

3287 (Thereupon, the original of Government's Exhibit No. 369 for identification was substituted for the carbon copy thereof.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 369?

A. Yes.

Q. And is that your signature, Mr. Tomkins?

A. It is.

Q. I now show you Government's Exhibit No. 370—this is not in your files, your Honors. I find I have the original of the consent. Government's Exhibit 370 purports to be a consent given by Mr. Keady of the United States Gypsum Company, addressed to the Kelley Plasterboard Company under date of October 3, 1938, in answer to Mr. Tomkin's letter of September 23, 1938.

Justice STEPHENS. Do you have photostats of that?

Mr. STEFFEN. I do not have photostats of that, but I will obtain them.

Justice STEPHENS. Will you please furnish them later so that the Court may have them?

Mr. STEFFEN. Yes, your Honor, we will.

Justice STEPHENS. Will you hand to the Court, Mrs. Gillette, so that the Court can see it, that exhibit?

Mr. BROMLEY. If we could see it—we may have photostats that we can furnish to the Court.

3288 Justice STEPHENS. Thank you.

(The document marked as Government's Exhibit No. 370 was handed to the Court for inspection and then handed to Mr. Bromley after examination by the Court.)



Justice STEPHENS. Did I understand you to say, Mr. Bromley, that the defendants might have photostats of this exhibit.

Mr. BROMLEY. Yes, your Honor, we find that we now have three photostats of Government's Exhibit 370 for identification.

Justice STEPHENS. That will save you the necessity of having to make them, then, Mr. Steffen. Thank you, Mr. Bromley.

(Photostatic copies of Government's Exhibit No. 370 for identification were handed to the Court and Government counsel by Mr. Bromley.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit 370 for identification, Mr. Tomkins?

A. I have.

Q. Do you recognize it as a letter which you received?

A. Yes, sir.

Q. That is your signature at the foot, is it?

A. It is.

Mr. STEFFEN. We now offer in evidence Government's Exhibits 366, 367, 368, 369 and 370.

Justice STEPHENS. Is there any objection?

3289 Mr. BROMLEY. May I see the original exhibits?

Justice STEPHENS. Yes, hand them to Mr. Bromley, Mrs. Gillette.

(Thereupon, the originals of the exhibits referred to were handed to Mr. Bromley.)

Mr. BROMLEY. May it please the Court, I make no objection as to competency, in the sense of lack of identification. I do, however, under the "complete evidence" rule, object to Exhibits 366, 367 and 368, on the ground that these letters were all answered, and consents given, and that it is unfair and improper to offer these exhibits without the answers, and especially in view of the fact that Exhibit 368 has a penciled note on it, "No answer as yet", leaving the inference that these requests for consents were never acceded to.

Therefore, unless the Government will stipulate, or produce the answers, all of which it has, to these requests, I object under the "complete evidence" rule.

Justice STEPHENS. Will you produce those, Mr. Steffen?

Mr. STEFFEN. I don't think we have them. I would like to ask Mr. Bromley to produce them.

Mr. BROMLEY. I will be glad to hand them to you to produce.

I now hand you photostats of the documents which were returned to the Government under subpoena, these photostats having been made at the time we delivered 3290 the originals of these documents to the Department of Justice, several years ago.

Mr. STEFFEN. In the course of those years, they may have disappeared, we don't have them, your Honor.

Mr. BROMLEY. Mr. Collins says I have been too generous in giving you all of our copies—give us some back.

Mr. FINCK. If the Court please, on behalf of Baker and National, I object to Exhibits 368, 369 and 370 in so far as they relate to perforated lath.

Justice STEPHENS. Well, in view of the ruling of the majority of the Court, that objection will be overruled.

Mr. FINCK. I just wanted to record it.

Justice STEPHENS. Surely, you are entitled to do that.

Mr. JOHNSTON. I take it, if the Court please, that there isn't any necessity of continuing with these objections in view of the ruling made, because our exception will be saved all the way through.

Justice STEPHENS. The record may show that Celotex, Texas and National have their continuing objection to evidence concerning perforated lath and metallized board.

The objection now made with respect to perforated lath is overruled, consistent with the Court's ruling on the reserved objections.

Mr. STEFFEN. As I understand it, the only objection now made is as to the completeness of these documents, and Mr. Bromley has handed us copies of certain 3291 documents.

If we might take the noon recess at this time, we will examine them and clear that up after we reconvene.

Justice STEPHENS. Yes, that may be done.

Justice GARRETT. Perhaps you might like to change the numbering of the exhibits already offered, in order to keep them in chronological sequence.

Justice STEPHENS. That might be done by giving "A" numbers to these additional exhibits.

The Court will now take its noon recess.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

## AFTERNOON SESSION

3292 (The trial was resumed at 1:45 o'clock p.m., pursuant to recess.)

Justice STEPHENS. Proceed.

Thereupon, Frederick Tomkins, the witness on the stand at the time of recess, resumed his testimony as follows:

## DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. At recess we had offered Government's Exhibits 366, 367, 368, 369, and 370.

Mr. Bromley supplied us with certain letters which we have examined during the recess, and the first of these is a letter dated July 16, 1937 —

Justice STEPHENS (interposing). Perhaps, Mr. Steffen, we had better wait until Mrs. Gillette gets here so we can have these marked in regular order.

Mr. KNUFF. I believe she was here, Your Honor. I think I saw her going down the hall a minute ago.

Justice STEPHENS. Well, we will wait just a moment, that is to say, if you have something to mark. If you haven't, go ahead.

Mr. STEFFEN. All I have is a photostatic copy supplied to me, and it was supplied upon the basis of being a genuine letter from the United States Gypsum Company addressed to Mr. Frederick Tomkins, under date 3293 of July 16, 1937, and in reply to Mr. Wileman's letter of July 8, 1937.

Justice STEPHENS. Here is Mrs. Gillette now, if you wish to have that marked.

Mr. STEFFEN. We are very glad to offer that as Exhibit 366-A, as a reply to Mr. Wileman's letter which is Exhibit 366.

Your Honors do not have copies of it unless Mr. Bromley has supplied you with them.

Justice STEPHENS. It may be marked Exhibit 366-A. That will be the most convenient way of marking, because otherwise the Court Reporter's records of this morning will not be correct.

(The document referred to was marked as Government's Exhibit No. 366-A for Identification.)

Justice JACKSON. That is in answer to Exhibit 366, is it?

Mr. STEFFEN. Yes, Your Honor.

We were also furnished with a photostatic copy of a letter dated July 26, 1937, from the United States Gypsum Company to Mr. Frederick Tomkins, in reply to his letter of July 21, which is Government's Exhibit 368. We ask that that letter of July 26, 1937, be marked Exhibit 368-A.

Justice STEPHENS. It may be so marked.

(The document referred to was marked as Government's Exhibit No. 368-A for Identification.)

Justice STEPHENS. Are there copies of that for the Court?

Mr. COLLINS. Yes, sir.

(Copies of Exhibit 368-A handed to the Court.)

Mr. STEFFEN. I would like now to offer 366, 366-A, 367, 368, and 368-A. The one objection that was made to those exhibits, of lack of completeness—which we doubt is a valid objection—has now been met, and we are offering all five exhibits.

Justice STEPHENS. Do you have any objection now, Mr. Bromley?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. Exhibits 366, 366-A, 367, 368, and 368-A are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 366, 366-A, 367, 368, and 368-A, were received in evidence.)

Mr. STEFFEN. The objection was further made that the letter of September 23, 1938, which is Exhibit 369, was incomplete, and Mr. Bromley supplied us with another letter dated September 23, 1938, signed by Mr. Tomkins, addressed to the United States Gypsum Company, which has to do with the same matter. He further supplied us with a letter, a second letter dated October 3, 1938, which has to do with the same matter as Government's Exhibit 370, which is dated October 3, 1938.

I don't believe that the Government's exhibits, as offered that is, 369 and 370, can be criticized for being incomplete. Exhibit 369 is a request for a consent to sell. Exhibit 370 is a letter granting a formal consent to sell. It seems to me, while we have no serious objections to the two letters offered by Mr. Bromley, I think they are more properly a matter for his case.



Justice GABRETT. And so you do not offer them?

Mr. STEFFEN. We do not, at this time, offer the two additional letters which Mr. Bromley furnished us.

Justice STEPHENS. Was one of them a response to the letter of September 23, Exhibit 369?

Mr. STEFFEN. Yes, I think it is, Your Honor.

Justice STEPHENS. Well, it probably would be more convenient for the Court if they were all in at this time, if you have no serious objection.

Mr. STEFFEN. I have no objection, Your Honor.

Justice STEPHENS. Let that be marked Exhibit No. 369-A.

3296 (The document referred to was marked as Government's Exhibit No. 369-A for Identification.)

Mr. STEFFEN. I see no grounds for offering 369-A, which we will call the letter of September 23, 1938, which Mr. Bromley gave me. It raises a discussion which is more appropriate to Newark and USG than to any issues in this case.

Justice STEPHENS. Perhaps I misunderstood you. I asked you if you had a response to the September 23, 1938, letter, Exhibit No. 369, and I understood you to say yes, and I suggested that you offer that.

Mr. STEFFEN. What I thought, Your Honor, was that the letter of October 3, 1938, or the consent, is a response.

Justice STEPHENS. And the letter of October 3 is Exhibit 370?

Mr. STEFFEN. That is right.

Justice STEPHENS. Have you any objection to 369 as incomplete, Mr. Bromley?

Mr. BROMLEY. Yes, Your Honor. An inspection of the second letter of September 23, 1938, shows that Exhibit 369 was but an enclosure. Therefore, Exhibit 369, which he is now offering, is nothing but an enclosure in another letter. What I handed him was the chief letter, to which Exhibit 369 was annexed as an enclosure.

3297 Justice STEPHENS. I see.

Do you object to offering that, Mr. Steffen?

Mr. STEFFEN. I don't know what Mr. Bromley wants it in for, and I am suspicious, to be perfectly frank. I don't think it is a serious matter one way or the other.

Mr. BROMLEY. I do. I think where a letter is enclosed with another letter, and you offer merely the en-

closure, that you ought to offer the covering letter along with it.

Mr. STEFFEN. The letter we have marked Exhibit 369 is a complete letter, and it doesn't make any difference whether it was enclosed with a dozen letters or was simply a single letter.

Justice STEPHENS. If it is an enclosure referred to in some other letter with which it was sent, it seems that the Court ought to be informed.

Mr. STEFFEN. We will be very glad to inform the Court, and will offer at this time as Exhibit 369-A, a copy of a letter from Kelley Plasterboard to USG, dated September 23, 1938, which encloses the request, which is Government's Exhibit 369, of the same date.

Justice STEPHENS. This says, in the first paragraph, "We enclose herewith copy of your letter of September 16".

Mr. STEFFEN. Do you have that, Mr. Bromley? If we are going to start enclosing, we might as well put them all in.

Mr. COLLINS. That is already in evidence, I believe. 3298

Justice STEPHENS. Does that refer to the one of September 23?

Mr. STEFFEN. I think that is in evidence, as Mr. Collins points out.

Justice JACKSON. That is, that 369-A is in evidence?

Mr. STEFFEN. No, the letter referred to in Exhibit 369-A as being dated September 16.

Justice STEPHENS. But what we were talking about a moment ago was the letter of September 23, Exhibit 369. Mr. Bromley objects on the ground that that is an enclosure, and you have offered 369-A as the letter in which 369 was enclosed; and it refers, in the first paragraph, not to the letter of September 23, Exhibit 369, but to a letter of September 16.

Mr. STEFFEN. You will find in the second paragraph, the second sentence —

Justice STEPHENS (interposing). I thank you, I am sorry. I find it now.

Exhibits 368-A, 366-A, and 369-A are offered in evidence. Is there any objection to them?

Mr. BROMLEY. Only the usual objection.

Justice STEPHENS. The exhibits are received, subject to

the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit 3299 No. 369-A was received in evidence. Government's Exhibits 366-A and 368-A were previously received in evidence.)

Justice STEPHENS. Is this letter of September 16, which is referred to in the first paragraph of Exhibit 369-A, in evidence?

Justice GARRETT. That seems to be Exhibit 366-A.

Justice STEPHENS. That is right.

Justice GARRETT. The identification of these exhibits that you have now offered is waived, I suppose?

Mr. BROMLEY. Yes, sir.

Justice STEPHENS. There is no objection made on the ground of identification.

Exhibit 369 is received in evidence, subject to the same reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 369 was received in evidence.)

Justice STEPHENS. Exhibit 370 has apparently not yet been offered.

Mr. STEFFEN. To make the record entirely clear, the letter of September 23, 1938, which is 369-A, and a 3300 photostatic copy of which was supplied to me by Mr. Bromley, refers to a letter of September 16 as being enclosed, and I have a copy of the letter of September 16, 1938, which was enclosed. I am not clear whether it was admitted in evidence to begin with, as one of the very early exhibits, or not.

At any event, I now also show the letter of September 16, 1938—and I have the original of the letter of September 23, 1938, which is Exhibit 369A—I can show both of those to the witness.

Justice STEPHENS. You may do so.

Mr. STEFFEN. And I would like to substitute the original of Exhibit 369-A for the photostat of Exhibit 369-A, and have the enclosure of September 16, 1938, marked as Exhibit 369-B.

Justice STEPHENS. That may be done.

(The document referred to was marked as Government's Exhibit No. 369-B for Identification.)

By Mr. STEFFEN.

Q. Will you look at Exhibit 369-B, Mr. Tomkins, and state whether or not you recognize Mr. Knode's signature?

A. Yes, I do.

Mr. STEFFEN. I think that Exhibit 369-B is substantially the same as Exhibit 32, which was admitted in evidence on the first day, but Exhibit 32 is dated January 3, 1939. This is offered simply for the purposes of completeness.

Justice STEPHENS. Very well. Will you furnish the Court with photostats of it so our file will be complete?

Mr. STEFFEN. We will.

Justice STEPHENS. Will you hand us that, Mr. Marshal? (Copies of Exhibit 369-B handed to the Court.)

Justice STEPHENS. Exhibit 369-B has not been acted upon, is that correct?

Mr. STEFFEN. Exhibits 369-B and 370 and 370-A have not been acted upon yet.

Mr. Bromley suggests that I offer Exhibit 369-B alone, first.

Mr. BROMLEY. We make only the usual objection to that exhibit.

In the interest of clarity of the record, I should like to state that Exhibit 369-B is a royalty-free perforated lath license, dated September 16, 1938, running from USG to the Kelley Company. That license was not assignable. Since it ran to the Kelley Company, after the merger it was necessary to execute another license. That was done in exactly the same terms, only the second license ran to the Newark Company instead of the Kelley Company. That second license is Exhibit 32.

Justice STEPHENS. Thank you for that statement.

You are now offering Exhibit 369-B?

Mr. STEFFEN. Yes.

Justice STEPHENS. It may be received subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document referred to, marked as Government's Exhibit 369-B, was received in evidence.)

Mr. STEFFEN. And we offer Exhibits 370 and 370-A.

Justice STEPHENS. Has Exhibit 370-A been identified?

Mr. STEFFEN. It was handed to us by the defendants.

Justice GARRETT. Exhibit 369-B is to be supplied for our records?



Mr. KNUFF. Yes, Your Honor.

Justice STEPHENS. Is there any objection to Exhibit 370-A?

Mr. BROMLEY. Only the usual one.

Justice STEPHENS. And you make only the usual objection to Exhibit 370 also?

Mr. BROMLEY. Yes, Your Honor.

Justice STEPHENS. Exhibits 370 and 370-A are received in evidence subject to the usual reservation with respect to the declarations of alleged co-conspirators.

(The documents referred to, marked as Government's Exhibits 370 and 370-A, were received in evidence.)

By Mr. STEFFEN.

Q. I would like to ask you some general questions about your business, Mr. Tomkins, now that we have gotten the various corporations straightened out.

As I understand it, the Newark Plaster Company has been in business for around a hundred years, either the present company or its predecessor?

A. That is right.

Q. Where did you get your raw gypsum?

A. We secured it from several sources, principally in Nova Scotia and New Brunswick and Provinces in Canada.

Q. Do you still have those sources?

A. No, we have no sources owned by the company, for gypsum rock, at the present time.

Q. When did you dispose of them?

A. We disposed of the gypsum property owned by the Newark Plaster Company in about 1934 or 1935.

Q. And where are you getting —

A. (Interposing.) I am not sure of that date, it may have been later.

Q. Where do you buy your raw gypsum now?

A. Well, we are unable to buy any raw gypsum now.

Q. Where have you bought your raw gypsum since 1934 or 1935?

A. We have bought some from the Canadian plants of the United States Gypsum Company, some from the plants of the National Gypsum Company in Canada.

Justice GARRETT. Just a little louder, Mr. Witness, please.

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. How long has it been since you have been unable to buy any gypsum?

A. I believe the last gypsum rock we were able to bring in by steamer was in 1941.

Q. The Government has taken over the vessels, or what is the reason?

A. At that time we were unable to secure vessels at a price that we could afford to pay.

Q. Do you buy any gypsum from the American Cyanamid Company?

A. We buy calcium sulphate from the American Cyanamid Company.

Q. What is the difference between calcium sulphate and gypsum?

A. Calcium sulphate is calcined gypsum.

Q. And your gypsum rock becomes calcined gypsum, does it not, after it goes through the initial process?

A. After it is processed, yes, sir.

Q. So that the two are substantially the same commodity in the calcined form?

A. No, the material we buy from the American Cyanamid Company is a completely finished, processed material. The material we bring in from Canada is a crude rock, a mineral.

Q. They have the same chemical content, once the rock has been calcined?

A. Well, if you process the rock from Canada, you come out with approximately the same chemically-composed material.

Q. That is what I was getting at. Are they the same price?

A. The rock and the calcined gypsum?

Q. The calcined gypsum that you make from the Nova Scotia rock, and the calcined gypsum that you procure from the American Cyanamid?

A. The price we pay American Cyanamid is substantially less than the price we would have paid for plaster if we had bought it from other companies.

Justice STEPHENS. Just a moment. Perhaps this is not important, but the Court wants to keep clear on the mat-

ter. The chemical constituents of the raw gypsum rock are not the same, are they, as the calcined gypsum, because one contains water and the other does not?

3306 The WITNESS. One contains more water than the other. They are quite different.

Justice STEPHENS. But the material you buy from the American Cyanamid Company, which you refer to as calcium sulphate, that is substantially the same as the material you make out of the raw gypsum rock when you can get it?

The WITNESS. That is correct. After we process the rock it is substantially the same.

Justice JACKSON. In other words, calcined rock is calcined rock, no matter where you get it?

The WITNESS. Yes, although the material we buy from American Cyanamid is synthetic.

By Mr. STEFFEN.

Q. And you say it is materially cheaper than that made from the rock?

A. No, I say that we are buying it at a lower price than we could purchase plaster, calcined gypsum made from rock.

Q. That is what I thought I asked you.

Now where did the Kelley Plasterboard Company obtain its source of supply for making plasterboard?

A. It obtained it from various sources. It purchased some plaster which was called stucco, for board manufacture from the Oakfield Gypsum Company. It purchased some, I believe, from the United States Gypsum Company. It purchased some from time to time from Structural Gypsum Company.

3307 Q. And Structural Gypsum Company is what concern?

A. It is a division or subsidiary of American Cyanamid.

Q. And the gypsum that they bought, or the calcined gypsum they bought from Structural, was this synthetic product that you speak of?

A. That is correct.

Q. Now in May, 1937, when you bought the stock of the Kelley Plasterboard Company, were you at that time selling any plaster to the Kelley Plasterboard Company?

A. The Newark Plaster Company, I believe, was selling some white plaster to the Kelley Plasterboard Company at that time.

Q. Did you buy any board from the Kelley Plasterboard Company?

A. We did not.

Q. And did the Calvin Tomkins Company buy any board from them?

A. No, it did not.

Q. Then as I understand it, the Newark Plaster Company and Calvin Tomkins Company were not in the board business at all, up until—when was it?

A. The Newark Plaster Company was not in the board business directly until it merged with the Kelley 3308. Plasterboard Company in January of 1939.

The Calvin Tomkins Company was not in the board business until after that merger, when it received the consent or when Newark received the consent from United States Gypsum to sell to the Calvin Tomkins Company.

Q. What were the considerations that moved you to go into the board business?

A. We wanted to expand our business and to increase our volume in our Newark calcining plant.

Q. And your plant is at Delawanna, New Jersey, or was?

A. Which plant do you mean by "your plant"?

Q. The board plant.

A. The board plant of the Kelley Plasterboard Company was located at Delawanna.

Q. And your plaster manufacturing plant was at Newark, is that correct?

A. That is correct.

Q. Now did Calvin Tomkins, or did you for Calvin Tomkins, consider buying board from USG or National or any of the other concerns, prior to May 1, 1937, on a basis of 12½ percent discount, or whatever you could arrange?

A. We never gave that any consideration.

Q. That was never considered at all?

A. Never.

Q. So that when you decided to go into the 3309 board business, you decided to go in and become a manufacturer, is that correct?

A. That is correct.

Q. What products did the Calvin Tomkins Company sell during 1936, 1937, and 1938?

A. The principal product sold by the Tomkins Company was white plaster.



Q. That was made by Newark?

A. By Newark, yes.

Q. Did they handle any other products?

A. No, at that time I don't believe the Calvin Tomkins Company was selling any other products, except in minor quantities.

Q. What products were they?

A. They may have sold some cold-water paint products manufactured by the United States Calcimine Company. We may have sold some neat plaster, which Newark would have purchased from other manufacturers, or possibly a small amount of sanded plaster, but nothing that was of any importance to the Newark or the Calvin Tomkins companies.

Q. You didn't handle a general line of fiber boards and insulating boards?

A. Not at all.

Q. Now since January 3, 1939, has Calvin Tomkins broadened its line of sales?

3310 A. Well, Calvin Tomkins, subsequent to January 3, 1939, has been engaged in the sale of gypsum board as well as white plaster.

Q. And by "board", you mean gypsum lath, gypsum board, and gypsum block —

A. (Interposing.) Not gypsum block.

Q. You don't make gypsum block?

A. Not now, we formerly did. We have not made gypsum block since 1929.

Q. You stated that the Kelley plant was located at Delawanna, and that is where they made board?

A. Yes.

Q. Did that plant burn down?

A. Yes, it did.

Q. When?

A. During March of 1940.

Q. And has it been rebuilt?

A. The Newark Plaster Company has built another gypsum board plant, but not at Delawanna.

Q. Where did they build it?

A. In South Kearny, New Jersey.

Q. How far is that from Newark?

A. About 7 or 8 miles.

Q. And when was that plant completed?

A. In December of 1940.

3311 Q. December, 1940?

A. Yes.

Q. And since that time, you have been making board and lath at your new plant?

A. The Newark Plaster Company has, yes.

Q. Do you also make perforated lath there?

A. Yes, we do.

Q. And metallized board?

A. Yes.

Q. That is, since December of 1940?

A. Yes. We haven't made that for a couple of years, though.

Q. I understand that. That is because of war conditions, is it not?

A. Yes.

Q. You can't get the foil to make the board?

A. That is correct.

Q. Now during the period from March, 1940, to December, 1940, where did you procure your board that you sold through Calvin Tomkins?

A. We purchased some board from National Gypsum Company, some from United States Gypsum Company, some from the Ebsary Gypsum Company.

Q. And that included perforated lath and metallized board?

3312 A. Yes.

Q. All three?

A. I don't know that we purchased any metallized board, I rather doubt that we did.

Q. Now since the Calvin Tomkins Company has been selling board, it has been selling board according to bulletin prices, is that correct?

A. That is correct.

Q. And they have sold all their lath and board according to the terms and conditions of the price bulletins, is that correct?

Mr. BROMLEY. I object to that unless that be limited to lath and board manufactured by the Newark Company.

Mr. STEFFEN. I am asking the broad question as to what they have been selling at.

Mr. BROMLEY. You said "under the terms and conditions of the bulletins". Now the bulletins only apply to board manufactured by the licensee.

Mr. STEFFEN. I will rephrase my question.

By Mr. STEFFEN.

Q. Calvin Tomkins has been selling board and lath on the same terms as are provided under the license bulletins, has it not?

A. Well, there have probably been exceptions to that. There has been no requirement to sell board at bulletin prices for some time.

3313 Q. What are you referring to when you say that?

A. A letter that we received from the United States Gypsum Company to the effect that no further price bulletins, selling bulletins, were going to be issued.

Q. Do you have the date of that?

A. I don't recall the exact date, no, sir.

Mr. STEFFEN. What was the date of that, please?

Mr. BROMLEY. July 8, 1941.

By Mr. STEFFEN.

Q. Since July 8, 1941, you have not been receiving bulletins from the United States Gypsum Company, is that correct?

A. That is correct.

Q. Prior to that time, from the time that Calvin Tomkins began selling board, it sold board at the same terms and upon the same conditions as were provided in the bulletins, with some possible exceptions, you say?

A. Yes, with some exceptions. During the period when we were purchasing board from other manufacturers, we followed the bulletin prices as a list of prices at which we sold. We were under no requirement to sell purchased board at bulletin prices.

Q. And when you say that, that is your construction of the law on the subject, is that correct?

3314 A. Yes, that is what I was advised.

Q. That is, by your counsel, Mr. DeWitt?

A. By my attorney, yes.

Q. In general terms, Mr. Tomkins, what amount of business do you do in board, a year, or were you doing in 1937, 1938, 1939 and 1940?

A. I have no recollection of our sales by years.

Q. You can give us generally your volume, can you not?

A. Generally. In 1937, we probably sold 30 million feet of board, all kinds of board.

Q. And in 1938?

A. About the same, that would be about the production of the Kelley plant.

Q. And you sold about the same amount in 1940?

A. In 1940 we sold less.

Q. That was because of the fire?

A. That was because of the fire.

Q. And in 1939, about the same as in 1937 and 1938?

A. I would say approximately. This is pure speculation on my part.

Q. You have only one mill, have you not? That is, you have the board mill and the plaster mill, but do you have any others?

A. The Newark Plaster Company has only those two manufacturing plants.

3315 Q. You have no mills throughout the country, as do the United States Gypsum Company and some of the larger producers?

A. No, sir.

Q. Why did you want to buy board, Mr. Tomkins, or go into the board business, in 1937?

A. We wanted to expand our business and increase the volume of gypsum produced at the Newark mill.

Q. Was it not difficult to sell plaster all alone?

A. We had never found it so.

Q. You sell a special grade of plaster, do you not?

A. I don't believe it is a special grade. We sell white plaster.

Q. And it is a high grade plaster, is it not?

A. Yes, you could call it a high grade plaster, I suppose.

Q. Do you find that you have increased your sales by being able to sell both plaster and board?

A. No, our sales of white plaster, I think, have steadily shrunk.

Q. Is that so?

A. Yes.

Justice JACKSON. Have what?

The WITNESS. Have shrunk.

By Mr. STEFFEN.

3316 Q. Your sales of board have been satisfactory, have they?

A. Not since the war, they have not.



Q. Well, now, certain of these consents that we were talking about in the last hour, had to do with perforated lath. Do you know why you were asking for consents concerning perforated lath in 1938?

A. I believe it was due to the change in the perforated lath license that we had. When we were notified of that change, I think the consent to sell was restricted, and we then felt we had to again write for a consent to sell these manufacturing distributors.

Q. I notice that each one of these consents states, "This consent may be withdrawn by us at any time", or "good until further notice", or something like that. It was true, was it not, that any of these consents were subject to immediate withdrawal if USG wanted to, at any time?

A. The ones I have seen in these exhibits were.

Q. That is correct.

Mr. BROMLEY. That is not correct.

By Mr. STEFFEN.

Q. Now in your sales to Structural and to Adamant and to Oakfield, did you furnish them with the prices at which they were to resell—I believe you testified that you did?

A. We sent price lists, price bulletins.

3317 Q. To each of the concerns I have mentioned, that is Oakfield, Structural, and Connecticut Adamant?

A. Yes.

Mr. O'DONNELL. Can we have the record clear as to by whom those bulletins were supposed to have been sent?

Mr. STEFFEN. Yes.

When I say "you sent prices to Structural and Oakfield and Connecticut Adamant", did you mean that during the period from May 1, 1937, to January 3, 1939, they were sent in the name of the Kelley Plasterboard Company?

The WITNESS. Yes, they would have been sent in the name of the Kelley Company.

Mr. O'DONNELL. And by the Kelley Company?

Mr. STEFFEN. And by the Kelley Company?

The WITNESS. Yes, they would have been sent by the Kelley Company only, during that period.

By Mr. STEFFEN.

Q. And thereafter, they were sent by and in the name of the Newark Plaster Company, is that correct?

A. No, the Calvin Tomkins Company.

Q. Excuse me, the Calvin Tomkins Company after that.

A. That is correct.

Mr. BROMLEY. I move to strike out the answer in so far as the Kelley Company is concerned. You don't  
3318 know what the Kelley Company did, do you?

Mr. STEFFEN. He was President for two years while they were doing it.

The WITNESS. I understood that I was only testifying about the period from 1937 to 1939.

Mr. STEFFEN. That was the question.

Mr. BROMLEY. Do we have what price lists you are talking about?

Mr. STEFFEN. I will develop that, if I may, in some detail.

Justice STEPHENS. You were an officer of Kelley during those two years, were you not?

The WITNESS. I was President of Kelley during those two years.

Justice STEPHENS. The motion to strike is denied, then, so far as that part of the testimony is concerned.

By Mr. STEFFEN.

Q. I would like to show you Government's Exhibit 371, which purports to be a letter from Mr. Kelley addressed to Charles F. Henning, Vice President, United States Gypsum Company, under date of September 21, 1936. I would like to have you read that, and then I will ask you some questions concerning it.

(The document referred to was marked as Gov-  
3319 ernment's Exhibit No. 371 for Identification.)

By Mr. STEFFEN.

Q. How long had you known Mr. Kelley, Mr. Tomkins?

A. I had known him for a number of years prior to 1937.

Q. And when you took over—you bought the stock from him—did you?

A. The Newark Plaster Company bought it.

Q. From Mr. Kelley.

A. I believe Mr. Kelley delivered the stock to us, he owned most of it.

Q. And did you take over the files of the Kelley Plaster-board Company when you took over the business?

A. Yes, all the books and records were left.

Q. And did you ever see that letter before, Mr. Tomkins?

A. Not to my knowledge. I may have seen it, but I have no recollection of it.

Q. Did you see a reply to that letter?

A. I don't recall seeing any reply.

Q. Is that Mr. Kelley's signature?

A. Yes, that is Mr. Kelley's signature.

Q. What was the practice at the time you came in and took over the Kelley Plasterboard Company, did USG at that time send prices directly to Oakfield and 3320 Structural and Connecticut?

A. Not to my knowledge, no, sir.

Q. And therefore you testified a minute ago that it was necessary for you to send the prices, is that right?

A. I don't —

Mr. BROMLEY (interposing). I object to that question as incompetent. However, if the witness says he didn't testify to that, I withdraw the objection.

Mr. STEFFEN. I think I can develop it more clearly, Your Honor.

I will now show the witness Government's Exhibit 372, and also Exhibit 373, which purport to be carbon copies of letters signed by G. A. Wileman and addressed, one to Paragon Plaster & Supply Company, under date of June 7, 1937, and the other to the Structural Gypsum Division of the American Cyanamid and Chemical Corporation under the same date.

(The documents referred to were marked as Government's Exhibits Nos. 372 and 373, respectively, for identification.)

By Mr. STEFFEN.

Q. You identified, I believe, both of those letters before the criminal court? Do you now do so?

A. There is no identification on them. I assume 3321 these letters were sent by Mr. Wileman of the Kelley Plasterboard Company.

Q. Who was Mr. Wileman?

A. He was the Office Manager of the Kelley Plasterboard Company.

Q. And will you state to the Court what prices were being enclosed in the letters of June 7?

A. I don't know just what prices were being enclosed. Presumably they were the prices at which we were selling wallboard to —

Q. (Interposing.) Was that your practice —

Mr. BROMLEY (interposing). Let him finish the answer. He started to say to whom.

The WITNESS (continuing). —at which we were selling wallboard to dealers at the locations referred to in these letters.

By Mr. STEFFEN.

Q. And when you say "we", you mean Calvin Tomkins?

A. No, I mean Kelley Plasterboard.

Q. That is, that Kelley Plasterboard was selling directly to dealers?

A. Yes, in 1937 Kelley Plasterboard was the only one selling directly to dealers.

Q. You have me all confused. So that the prices you have in mind there are the prices that the Kelley 3322 Plasterboard Company was charging to dealers in the sales area in question?

A. I assume that that is what the prices were.

Q. I think you have testified that that was your practice, did you not?

A. I don't know that I testified that it was our practice. I assume that it was done. I have these letters here showing it was done. Whether it was a practice that was followed consistently or not, I don't know.

Q. What we want to get clear is that the prices you sent to Oakfield and to Structural would be the prices at which you yourselves were selling?

A. Surely.

Q. And those prices were the prices specified in the United States Gypsum Company's price bulletins?

A. That is right.

Q. Did you have any conversation with Mr. Kelley concerning this matter of supplying prices to the manufacturing distributors at the time you took over the Kelley stock?

A. There again, I have no direct recollection of a conversation. I am sure that Mr. Kelley and I discussed it, and that he told me that he was making these sales to these manufacturing distributors, and that he felt it was good business to do so.



3323 Q. And he told you that they sold at the same prices that you were selling?

A. I don't follow you.

Q. That Kelley was selling?

A. He told me that these distributors sold at the same prices that Kelley was selling?

Q. Yes.

A. I don't know that he told me that.

Q. Was that your understanding, that they did?

Mr. BROMLEY. I object to that on the ground that it is incompetent as to what his understanding was.

Mr. STEFFEN. Mr. Tomkins is a defendant, and his understanding is very material.

Justice STEPHENS. Well, of course, you are proceeding under Rule 43, but where you are proving a fact you must prove it by competent evidence. Understanding is frequently the subject of cross-examination where there has been a prior direct-examination, as testing the reasonableness of a witness' answer. But that is not the theory on which you are proceeding here. You are here proceeding to establish the facts yourself. You are being permitted to ask leading questions under Rule 43. But where you seek to establish a fact, it can't be done by the witness' understanding. It must be done by items from which the Court can draw a conclusion.

3324 Mr. STEFFEN. Your Honor, this is a defendant, and if a defendant can't state what his understanding was, nobody could. I am prepared, however, to refresh his recollection on this point.

Justice STEPHENS. If you will, please.

By Mr. STEFFEN.

Q. I think you testified before the criminal court—and I show you page 871 of your testimony, and ask you to read the last two questions and answers.

Does that refresh your recollection?

A. Yes, this says that my recollection at that time was that "they sold board they purchased from Kelley at the established bulletin prices to the dealer trade."

Q. And is that your present understanding?

A. Well, as I said before, I have no recollection of these conversations. I would assume that I did have that understanding.

Q. Well, would you say from your present recollection

that that is a substantially correct statement?

A. Yes.

Justice STEPHENS. Who do you mean by "they" in that answer?

The WITNESS. The manufacturing distributors that the previous testimony referred to.

3325 Mr. STEFFEN. In order to make it clear on the record, Your Honor, the question which was asked Mr. Tomkins was:

"Q. What were those discussions?

"A. Mr. Kelley explained to me that his company had been selling board at a discount to the Oakfield and Structural companies, and that in his opinion it was desirable business; it gave tonnage to the Kelley plant which needed it and did not offer any competition that had bothered him in any way.

"Q. What did he say about their prices?

"A. My recollection is he said that they sold board they purchased from Kelley at the established bulletin prices to the dealer trade."

By Mr. STEFFEN.

Q. I would like to ask you a question or two concerning Exhibit 372, Mr. Tomkins.

Mr. STEFFEN. Before I ask him the questions, may I offer Exhibits 371, 372 and 373 in evidence.

Mr. BROMLEY. I object to Exhibit 371 for Identification as immaterial, irrelevant and incompetent, and on the ground that it only partially presents the transaction in question and therefore violates the complete evidence rule. This letter, by itself, would indicate that USG and Kelley sent licensee bulletins to these manufacturing distributors. There is a reply to the letter which the Government has in its possession, which these attorneys know  
3326 or should know about, which completes the transaction. Without that reply this letter is completely misleading, and it is therefore incompetent and immaterial.

So far as the other two exhibits are concerned, I object to them on the ground that they are incompetent because incomplete, since the price lists referred to in each letter are not attached. These documents, in my judgment, should not be admitted unless the Government concedes that the price lists referred to, and attached, are the price lists showing the Kelley prices which Kelley charged these manu-

facturing distributors, because that is what they were.

Mr. STEFFEN. There are two objections, Your Honor.

As respects Exhibit 371, this complete evidence rule, which is a new one if it exists at all, I think can be met if Mr. Bromley or the defendants will produce the answer. We do not have the answer to that. And we do not, under any notion of the complete evidence rule, propose to put their answer in. This shows that Mr. S. J. Kelley had, at the date of the letter, an understanding that it would be more convenient for the United States Gypsum Company to send the price lists direct, the bulletin prices direct to the Structural and Adamant and Oakfield companies, and as an admission it would be strictly relevant without any answer or whether there was any answer. If  
3327 Mr. Bromley has an answer and wants to offer it at the proper time, it is his pleasure to do it.

Mr. BROMLEY. I object to this practice of putting in half the story when the Government has these original documents in its possession. I don't think it is fair.

Mr. STEFFEN. It is the same thing as with cross-examination. When you ask a question we have to go back and look it up.

Mr. BROMLEY. I would like the Court to look at this letter so they will know what we are talking about.

Justice STEPHENS. You are talking about Exhibit 371?

Mr. BROMLEY. Yes, and the answer thereto.

(The reply to Exhibit 371 referred to was handed to the Court.)

Mr. STEFFEN. I object to the Court's looking at that, at least until we have had a ruling on this matter. We might as well have a ruling on this matter now, of whether we must put in the whole story when we decide to put in certain exhibits.

Justice JACKSON. The Court wants the full story, Mr. Steffen.

Mr. STEFFEN. I am very glad to let the Court have it.

Justice STEPHENS. The objection to the Court's looking at the letter is overruled. We are not going to blind our eyes to what is going on.

3328 Mr. STEFFEN. I would like to make one concession; we concede that the Court may do that.

Justice JACKSON. Thank you.

Justice STEPHENS. The court is of the view that if the Government has available letters which complete a transac-

tion, the Court ought to have the whole transaction before it at once. It is true that the defendants might be able to put this in as a part of their defense, but the difficulty with that is that we get a part of the story at one time and a part later. Since there can be no dispute between the parties, apparently, as to this reply having come in, to Exhibit 371, under date of September 29, 1936, it seems to the Court that it is only fair that it should be put in with Exhibit 371. If you read Exhibit 371 alone, it gives the transaction a certain cast. If you read Exhibit 371 and the answer of September 29, not yet marked, it gives it a different cast. We don't quite see the Government's desire to give the Court a half story when it has the whole story.

Mr. STEFFEN. We have no purpose, Your Honor, of giving the Court half the story. We, however, are proceeding according to the traditional way of putting our case. It is then for the defendant to put in his case. When the defendant puts their man on the stand, whoever he may be, to identify this letter, we then have an opportunity to ask him whether it was a subterfuge. On the face of it, it looks as though it might be, that is, that they want to avoid the appearance of fixing prices. If we put it in now, Your Honor may take it literally as being a letter which says that, "we are all aboveboard, we have no idea of controlling prices," when I think we could establish, with their witness on the stand, that they were pretty sure that they were going to control the prices of the manufacturing distributors; otherwise, they wouldn't allow them to sell.

But they wanted to avoid the appearance of doing what Mr. Kelley suggested, which would be the straightforward way to do it, that is, to send the prices direct. And so they write this letter, which is a self-serving declaration.

We have no objection to this coming in at the proper time, properly identified by a witness on the stand whom we can cross-examine.

It is the same thing as the other day. Mr. Bromley asked questions of Mr. Spease. Mr. Spease wanted to qualify his answers, and Your Honor properly told him that he should say yes or no, and that we in our turn would have an opportunity to clarify the answers.

Justice STEPHENS. We don't mean to put the Government at any improper disadvantage with respect to its case, or to require it to put in the defendants' case by way



of defense. If that is the difficulty here, perhaps  
3330 that puts a little different light on it.

What do you say to that, Mr. Bromley?

Mr. BROMLEY. I say it is going to make it difficult when we come to our case, with the Government having the original of that document, and we therefore not being aware where it is, and the writer of the letter, Mr. Henning, being dead. He talks quite boldly about our putting the witness on the stand who wrote the letter. He knows he died in 1936, and that I can't put him on the stand. I am afraid I can't get the letter, even; and although we gave it to him, and you can see from these letters that they were stapled together, as is the custom, they just show up with one of them.

I think that puts me at a disadvantage where I may not be able to identify it on my case. If they don't produce the original, I don't know what I am going to do. They certainly have got it, because these are photostats made at the time we gave them the originals.

Mr. STEFFEN. We will make a search for the copy. As far as Mr. Henning being dead is concerned, I am sorry, but Mr. MacLeish is here and he was the attorney who gave the advice, as I understand it.

Mr. BROMLEY. You can see the numbers, 221 and 222, on the bottom of these photostats. We numbered them at the bottom prior to having them photostated; and  
3331 you can also see the holes at the top where they were stapled together, but still the Government only presents one of them.

Justice STEPHENS. We will take the afternoon recess now.

(Thereupon, a short recess was taken, after which the trial was resumed as follows:)

3332 Justice STEPHENS. It would be easier for the Court to understand these transactions if all of the connected documents could be put in at one time, and upon that theory the connected documents thus far admitted, were received. The Court suggested that they be offered, and the Government acquiesced in offering the connecting portions.

The Court wants to try this case as simply and as fairly as it can. It is a complicated, difficult case, and the separation of evidence into parts, especially where there are so many documentary letters, is likely to be a little confusing. But we do not understand, Mr. Bromley, that the "com-

plete evidence" rule goes so far as to compel, where there is objection raised to doing it as there is now, the proponent of a part of a declaration or admission to put in all of it.

We do not think there ought to be maneuvering on either side to put the opposite side into a difficult position, and we do not, by that statement, suggest that there has been or is any such maneuvering.

We can see some disadvantages to the defendants if they are required to actually offer in evidence at the present time the explanatory document. They might possibly be under the difficulty of having waived their right to make a motion, at the close of the Government's case, to dismiss, if they saw fit to make such a motion.

On the other hand, Mr. Bromley, perhaps the Government would be put to a disadvantage if it is required  
3333 to put the second part of the declaration in, that is the reply letter in this instance, because the defendants might be in a position then to contend that the Government was bound by it, because it had introduced it, and therefore could not call witnesses to show that the whole transaction was what the Government claims it to be, a guilty transaction.

The only authority we find on the subject is in Jones on Evidence, which reflects what I personally—and I think my colleagues join me in this—have always thought to be the rule that:

"It is the settled rule that the whole of a declaration or statement containing an admission should be received. 'Every admission is to be taken as an entirety of the fact which makes for the one side with the qualifications which limit, modify or destroy its effect on the other side.' The reason for this practice is that, where part of a statement of a party is used against him as an admission or declaration against interest, the jury should consider and weigh any other portions of the statement which tend to neutralize or explain the portion which is against interest. In other words, the probative value of the evidence is to be determined from the statement as an integrated unit and not from a part which is disassociated from the other parts. . . ."

"However, it does not follow that the one offering the admissions is compelled to offer in the first  
3334 instance the whole conversation or statement. He offers that part which he considers advantageous

or, which the witness remembers, and his adversary has then the right to bring out the remainder by cross-examination or otherwise as he may see fit."

We think there is no doubt but what you have a right, Mr. Bromley, eventually, to put in such statements as complete the whole correspondence. In other words, it is certainly relevant and material to show to the Court the entire transaction. But we do not understand the "complete evidence" rule to go so far as to authorize the Court to require the Government, as a part of its case, to put in the whole of the correspondence.

Mr. BROMLEY. My understanding was that Mr. Wigmore, in Section 2014 of his Third Edition, Volume 7, at page 502, was of the opinion that it was a ground of objection that the "complete evidence" rule not only made, of course, the subsequent part of the transaction not offered, competent and material, but it was a ground of objection to the offer of the first part. I understood it to be his opinion that that did not apply to all testimony, but did apply to documents where there was a reference, for instance, in a first document which is offered by the proponent, to another document.

It was a ground of objection to that first document under this rule that it should not be received until and unless the second document were offered. And he certainly 3335 does not limit it to those instances where there is a reference, because he also says, "The same principle would apply to another writing not expressly referred to but necessary by the nature of the documents to a proper understanding of the one offered."

So, contrary to what Professor Jones seems to say, the reason I made the objection on that ground was that I understood Wigmore to say it was a ground of objection. Of course I understand, if I can ever get the letter, that I can offer it in evidence when my turn comes.

Justice STEPHENS. You can also cross-examine this witness with that as a basis, can you not?

Mr. BROMLEY. No, I cannot.

Justice STEPHENS. You don't have to offer it, you can cross-examine on it, can you not?

Mr. BROMLEY. No, I cannot possibly do so.

Justice STEPHENS. Why not?

Mr. BROMLEY. Because it isn't his letter.

Justice STEPHENS. If he knows about it —

Mr. BROMLEY (interposing). It is long before he had anything to do with the situation. This is back in 1936 when he had nothing to do with this business at all. It is written by Kelley to Henning, and Henning answers it, and Henning is dead. So I cannot cross-examine this witness about it at all. He knows nothing about it whatsoever.

3336 Then they come along, having put this letter, dated in September, 1936, in evidence, with this suggestion, that United States Gypsum price bulletins would be sent to manufacturing distributors, and they produce two letters, dated in 1937, one of which goes to Oakfield, and which says something about a price list, and they don't produce the price list.

They seek to create the inference in your minds that after this letter of September, 1936, this Kelley Company actually sent these bulletins.

Well, I say that the whole thing is so unfair that it ought to be stopped, because Mr. Steffen knows as well as I do that the price lists which he does not produce, were Kelley's own price lists showing the prices that Kelley charged to these people to whom he sent them. I think the whole thing is so unfair that the Court in its discretion ought to sustain objection to it, and I thought it had the power to do so under the law as expounded by Mr. Wigmore.

Justice STEPHENS. What do you say to the proposition that concerns the Court, in your argument, that if the Government offers these as a whole, they are bound by them?

Mr. STEFFEN. I think we are.

Mr. BROMLEY. I will waive that. I never thought that was the doctrine. Let me go back.

Isn't it a principle that any party can offer contradictory evidence on any subject? If I am a  
3337 plaintiff and put a witness on the stand to prove that the defendant's car was going forty miles an hour, I can contradict my own testimony thereafter, I am not bound by the testimony I put on. Any party can offer evidence in his case, even though it is contradictory. If he claims —

Justice STEPHENS (interposing). You can't impeach your own witness.

Mr. BROMLEY. Oh, no, but that is not my proposition. If he claims that this is a subterfuge and that I would



object, after the receipt of the letter of September 29, 1936, not yet marked, on the ground that he is bound by it, I will say now that I will make no such contention.

Mr. STEFFEN. Your Honor, it is a broader proposition than that, and I should like to speak about that for just a moment.

Justice STEPHENS. Very well.

Mr. STEFFEN. I think the rule that Mr. Bromley has in mind, the Wigmore rule, is not inconsistent.

Where I have a contract to purchase, and then I also have a secret contract or release, and I offer that contract and do not offer the rest of it, it would be perfectly appropriate to insist that I put both in, or none.

But we are not doing anything of that sort. Here is a case where we have a letter coming from one side, and a reply which is a self-serving declaration, coming from the other. We put in the statement which is made 3338 by Mr. Kelley, which we think has a certain amount of truth in it. We are handed here a photostatic copy of what purports to be a letter by Mr. Henning, which we will assume for purposes of argument is a true letter. I will say frankly that I hadn't seen it.

I say that it is for them to put that in as part of their case, and when they put the letter in, if they do, I would then have an opportunity, which otherwise I am going to be utterly deprived of, to question the man who identifies the letter or knows about the transaction, as to whether or not they were not merely trying to cover up the transaction, which is the way I regard it; and to put it in now would be having us put in the defendants' case.

Now so far as Mr. Henning being dead is concerned, it doesn't injure Mr. Bromley any more than it does me, because how am I going to cross-examine Mr. Henning if and when the letter is offered?

So that I don't see that there is any objection on that score.

Now there were certain statements made concerning Exhibits Nos. 372 and 373, as respects price lists.

Three times now Mr. Bromley has tried to get the idea before you that those prices mentioned in those letters are —if I may attribute to him that statement, and I think he

said it—that those prices are prices at which Kelley 3339 sold to Structural, and inasmuch as we do not have the price lists, which of course we don't have—oth-

erwise we would be delighted to present them—he says that we ought not to offer them at all.

I propose to show by the witness, in fact have already shown by this witness, that the prices included in Exhibits 372 and 373 were the prices at which Kelley sold to dealers, similar dealers to whom the Structural and the Oakfield people would themselves sell.

So that his effort, as I see it, to say that it is unfair to him, is unfair to us in that respect, and I should like to proceed to question the witness about several things concerning those two letters, and it is then open—we will probably call Mr. Eldred—to ask Mr. Eldred or anyone else, or it is open to the defendants to call Mr. Eldred and ask whether or not they did sell at bulletin prices.

We have no desire, let me make it very clear, to hide anything, but on the other hand we want to have, as I think your Honors do, we want to have the case presented as fairly and clearly as possible.

Mr. BROMLEY. Now if your Honor pleases, so far as Exhibit 372 is concerned, I will add this to my objection: That letter was sent to a company which is not a manufacturing distributor, and which the evidence shows was a dealer. That is Exhibit 372 for identification.

3340 Justice STEPHENS. Excuse me until I get that.

I seem to have misplaced it. That is a letter to the Paragon Plaster Company from Wileman?

Mr. BROMLEY. Yes, your Honor.

Justice STEPHENS. What do you say about that?

Mr. BROMLEY. I say first that if Mr. Steffens is right—and I think he is—that the price list sent with that letter was a price list of Kelley's prices to dealers, the prices that Kelley charged dealers. Paragon was a dealer, and that was merely a supplier sending to his customer the prices which the supplier was asking the customer to pay.

Now the evidence in this case shows that Paragon was a dealer. There is no charge in the complaint anywhere, either in this case or the criminal case, that these defendants ever conspired to control dealers' retail prices. Therefore that exhibit must be entirely immaterial to the charge. Nobody from the Government has ever suggested that these defendants ever attempted to control the resale prices of the 20,000 dealers in this country. Paragon is one of these dealers.

Of course the Kelley Company would send to Paragon a

list of dealers' prices, because Kelley was trying to sell Paragon at those prices.

Now so far as Exhibit 373 is concerned, that is a letter from Kelley to Structural. Now Structural is a manufacturing distributor, not a dealer. The evidence al-  
3341 ready in the case shows that the price which Kelley was obligated under its license to charge to a manufacturing distributor like Structural, was the dealer price, less a discount. And my friend knows that these price lists which Wileman sent to Structural were merely the prices which Kelley was going to charge Structural, the prices to which the discount should be applied, and that is all they were, and this witness has testified that they were the dealer prices. That is what they were.

Mr. STEFFEN. I might say as to the Paragon situation, that the facts are not all in as yet. Paragon was one of the shareholders in Oakfield, and I would like to ask the witness a question or two as to what his understanding of the reasons for sending this to Paragon might have been.

Mr. BROMLEY. Don't you concede that in your Bill of Particulars you have listed the manufacturing distributors, in response to my demand, and you did not mention anything about a company called Paragon?

Mr. STEFFEN. I think that is utterly irrelevant, your Honor.

Justice STEPHENS. What is the citation in Wigmore to which you referred?

Mr. BROMLEY. Volume 7, page 502, Third Edition, Section 2104.

3342. Justice STEPHENS. What do you say, Mr. Bromley, as to the difficulty the Government finds itself in, that if it puts in this document, rather than having it introduced by its opponent, in the course of the opponent's case, it is denied the right to cross-examine as to the circumstances under which the document was written?

The Government charges, and is entitled to endeavor to prove, that the transactions involved were cloaks and subterfuges. How is the Government going to be able to cross-examine, even if you waive any claim as to the Government being bound by the document as a part of its case because it introduced it—how is the Government going to have an opportunity to cross-examine to bring out the circumstances under which the letter was written, if you introduce

it, assuming you could introduce it through a witness who knew something about ?

Mr. BROMLEY. Well, of course I suppose all I could do is produce a witness who knew Mr. Hennig's signature, if I have the original letter. I haven't any other witness who knows anything about it. If I can identify his signature, that is all I can do. So they won't have any bigger chance when I get this letter than they do now. We have nobody that knows anything about the letter.

Justice STEPHENS. Of course that is an academic illustration in the present situation on account of Mr. Henning's death, but we are laying down a rule which  
3343 we suppose will guide Court and counsel for the balance of the case, if there are episodes of this sort again.

If you are going to have a lot of this class of testimony, Mr. Steffen, we will have to make a ruling. Of course, if you are not, if this is a sporadic, exceptional situation, it would seem to us that the denial of your right to cross-examine is more or less academic in view of the fact that Mr. Henning himself isn't available, the man who wrote the letter.

Mr. STEFFEN. We would like a general ruling for the reason that there will be other illustrations.

Justice STEPHENS. It would be very much preferable from the standpoint of the Court if the Court could see all this correspondence at one time. You gentlemen have been working on this case for years. You are familiar, on both sides, with all of these documents because you have had a long time to examine them. I think you can hardly realize the task upon the Court of getting clearly in its mind this tremendous mass of correspondence and documents. To read it as constantly as we do, and examine it as carefully as we do, is a very difficult job, and it would be very much easier for us if we could have whole impressions at one time rather than half impressions.

Nevertheless, if you insist upon a ruling, we shall be obliged to make one.

3344 Since the matter will affect other items of testimony, as the Government suggests, and because we want to make a sound and proper ruling, as we want to do in deciding every point, as far as it is within our capacity, strictly according to the law, could you not perhaps take up some other line of examination with this witness at this



time, so as not to keep him here any longer than necessary? Then we will go on until four o'clock, and we will think about this during the evening and rule in the morning on the subject.

Before you go to that, let us be perfectly sure just which documents we are discussing at the moment.

Mr. STEFFEN. As I understand it, it is Exhibit 371, and the question of whether a reply, dated September 29, must be introduced as a condition of having 371 introduced.

Justice STEPHENS. The letter is the letter of September 29th, not yet marked?

Mr. STEFFEN. Yes.

Justice GARRETT. And also Exhibit 372 is involved in the argument?

Mr. BROMLEY. Yes, and Exhibit 373, your Honor.

Justice STEPHENS. 372 and 373?

Mr. BROMLEY. Yes, your Honor.

Mr. STEFFEN. As to Exhibits 372 and 373, as far as I know there are no price lists, and I don't have any replies, and I don't know whether defense counsel have any.

3345 Justice STEPHENS. Exhibits 372 and 373 have to do with price lists?

Mr. STEFFEN. That is right.

Justice STEPHENS. Proceed then, if you can, on another line for the remainder of the session.

By Mr. STEFFEN.

Q. I show you, Mr. Tomkins, Government's Exhibit No. 374 for identification, which purports to be a letter from Mr. Wileman, addressed to the Oakfield Gypsum Corporation, under date of April 2, 1938, and ask you to read that, please, and state whether or not you can identify that as a copy of a letter that Mr. Wileman sent. You identified that, I believe, at the criminal trial, Mr. Tomkins.

A. Yes. There is no signature on it, but I assume that it was sent from Kelley's office.

Q. Do you recall having received a reply?

A. I have no recollection of a reply, no, sir.

Mr. STEFFEN. I think Exhibit 374, your Honor, is in the same bracket with Exhibits 372 and 373, probably.

By Mr. STEFFEN.

Q. At this time, Mr. Tomkins, the Kelley Plasterboard

people were selling gypsum board and gypsum lath to Oakfield, were they not?

A. Yes, they were.

Q. And they were selling on a basis that Oakfield received a discount of 12½ per cent on lath, and 15  
3346 per cent on board?

A. From the dealer prices, yes.

Q. From the dealer prices?

A. That is right.

Q. And the information given in this letter of April 2, 1938, would be material to Oakfield if Oakfield was reselling at the dealer prices, would it not?

A. Well, it would be material to Oakfield in any event.

Q. Yes; and it would also be material if they were selling to dealers the board they bought from you, is that not correct?

Mr. O'DONNELL. That is argumentative, your Honor, and I object to the question.

Justice STEPHENS. Read the question.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Read the question and answer before that.

(Thereupon, the record was read as requested, by the reporter.)

Justice STEPHENS. Which letter are you asking about, this Exhibit 374?

Mr. STEFFEN. That is correct. It is simply a direct question, your Honor.

3347 Justice STEPHENS. I don't understand it yet, that is the difficulty. I have had my mind on this other topic, and I am a little behind you, I am afraid.

Now will you read the last two questions?

(Thereupon, the record was reread as requested, by the reporter.)

Mr. BROMLEY. I don't understand what he is talking about.

Mr. STEFFEN. If the witness does, that is all that is strictly material.

Mr. BROMLEY. It seems to me that this letter is completely immaterial. I don't see how it could possibly have anything to do with resale price fixing.

Justice STEPHENS. I don't understand it myself, yet. It doesn't seem to me argumentative, however, which is the

objection Mr. O'Donnell raised; I just don't understand it. Maybe you can clear it up for us.

Mr. STEFFEN. I would like to ask the witness some questions.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. At about this time, Mr. Tomkins, was there an increase in freight rates?

A. Well, I presume there was; otherwise this letter would not have been written.

Q. You are familiar with the business, and there was an increase in freight rates at about that time, 3348 was there not?

A. Yes.

Q. And in selling board, how is board sold to the dealer, how do you invoice it?

A. I don't know just what you mean.

Q. You have a mill base, plus freight, do you not?

A. Yes.

Q. And if Oakfield were selling board which they bought from Kelley, how would they price it?

A. They would price it on the same basis; if they were selling to a dealer, they would price it at the mill base, plus freight to destination.

Q. And they were buying board from you which they were reselling to dealers?

A. Yes.

Q. So that this information was very material to them in their resale of board purchased from Kelley, was it not?

A. Well, yes, otherwise they would have sold board at a lower price.

Q. And they would have been then underselling other companies which were selling direct and selling at the higher freight rate?

A. Well, if they did not add a freight increase, and other companies did, they would have been selling below the prices of the other companies.

3349 Q. That is correct, and therefore you were giving them the information so that they wouldn't be underselling, isn't that right?

A. I don't know that the information was given to them for that reason, it had that effect. That is the reason that I said that this was material to Oakfield in any event.

Q. That is, it would apply upon your sales to Oakfield for Oakfield's own use?

A. Yes, I should think so, because their price, i. e., what Oakfield had to pay Kelley, depended upon the dealer price. It was  $12\frac{1}{2}$  per cent less than the dealer price. Consequently, if the dealer price increased, their price would increase, and if they took business from a dealer that did not give effect to the freight increase, they would be at some disadvantage, it would be taken out of their  $12\frac{1}{2}$  per cent.

Q. That is right. Now I call your attention to the last part of the letter which says, "if you do not know the new price, you take orders subject to a slight increase in price due to this freight raise."

That had to do with Oakfield's sales to dealers, did it not?

Mr. BROMLEY. Wait a minute, you didn't read that right, did you?

Mr. STEFFEN. I tried not to read it all. Will you read that last part and tell me if it necessarily had to do with Oakfield's sales to dealers?

3350 The WITNESS. Shall I read the whole letter?

By Mr. STEFFEN.

Q. No, read the last sentence.

A. Now may I have the question?

Q. My question was—doesn't that sentence apply directly to sales made by Oakfield to its dealer trade, of board which it purchased from you?

A. Yes, this means that we are putting Oakfield on notice that there is going to be an increase in the price.

Q. That is right.

A. Consequently, we suggest that if they don't know how much the increase is, they take orders subject to such increase.

Q. That is right. And the orders are for board which you are going to sell to them?

A. No, "you take orders" would be orders from dealers, not for board that we were going to sell them.

Q. Well, what was Oakfield selling? They were buying board from Kelley, were they not?

A. That is right.

Q. And reselling that board to dealers?

A. Correct.

Q. And in reselling it to the dealers they resell at the dealer price, do they not?



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A. Yes, they usually do.

Q. And that dealer price is the mill price, plus  
3351 freight, is it not?

A. Yes.

Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?

A. Yes, otherwise they would be at a disadvantage.

Mr. STEFFEN. Is that perfectly clear?

Justice JACKSON. No, it isn't. Doesn't this mean that there is a new price because there is an increase in freight?

The WITNESS. Yes, that is exactly what it means.

Justice JACKSON. It isn't a price increase per se?

The WITNESS. No, it is simply a freight addition added to the price.

Justice JACKSON. Now I am clear on it.

By Mr. STEFFEN.

Q. That is, your price to dealers is the mill price plus freight, is it not?

A. Yes.

Q. And in invoicing to dealers you would have to know both items, the mill price to dealers, and the freight?

A. Yes.

Q. And this indicated that in selling at the prevailing price to dealers, they would have to know both items, freight plus mill price?

A. Yes, they would have to know that, in order to know what they were going to have to pay for  
3352 board.

Q. And therefore it was very largely a matter of informing Oakfield as to prices which they would charge dealers?

A. Well, it was a matter of informing Oakfield what the dealer prices were, that was our basis of doing business with Oakfield, it was based on dealer prices.

Q. And it was in order that Oakfield would sell at dealer prices?

A. Not necessarily —

Mr. BROMLEY (interposing). Wait a moment.

By Mr. STEFFEN.

Q. That was so that Oakfield would be selling to dealers at the prevailing price?

A. This information was given to Oakfield so that Oakfield would know what the dealer price was.

Q. And I followed that question up with—so that when they sold to the dealers, they would sell at the right price?

A. They could if they wanted to.

Q. So when your letter says, "you take orders," and so forth, that referred to taking orders from dealers, didn't it?

A. Yes.

Q. And they would have to know what the prevailing price to dealers was, isn't that right?

A. Surely.

Q. And that price is made up of the freight rate, plus the base price?

3353 A. That is right, which was the basis of their discount.

Q. That is right.

A. Correct.

Q. I think we are all straight.

Mr. BROMLEY. It is clear to you, is it?

Mr. STEFFEN. Well, it will be much clearer when we get through with the cross-examination.

Do you wish to adjourn at this time?

Justice STEPHENS. Yes. But before we adjourn let me make an inquiry.

About how long do you anticipate the direct examination of this witness will occupy?

Mr. STEFFEN. Until about noon tomorrow, your Honor, and maybe a little bit longer.

Justice STEPHENS. Will you hand back to the Court—I think you have it, Mr. Finck—the criminal record that we read from this morning.

(The record in the criminal trial was returned to the Court.)

Mr. STEFFEN. We should be very glad, your Honor, to have an expression of the Court's views on that with reference to the points in the record, if you propose to do that.

Justice STEPHENS. An expression of the Court's views as to what?

Mr. STEFFEN. Upon the matter that was discussed this morning, having to do with the concession, or alleged concession on the part of the Government.

3354 Justice STEPHENS. We have already ruled on that.

Mr. STEFFEN. You don't propose to extend your remarks at all?

Justice STEPHENS. No, we had in mind only that there ought to appear in the record all that the Court examined.

Mr. STEFFEN. I see.

Justice STEPHENS. Part of it was read into the record, but not all of it. There was one passage commencing at page 938, and going to page 939, and another one commencing at page 886.

Let the record show that, in connection with its ruling this morning on the question whether or not the Government had conceded at the criminal trial, and was therefore now conceding, in order that its position in both instances might, in good faith, be consistent, that sales by Newark to or through the Calvin Tomkins Company were not illegal under the Sherman Act, the attention of the Court was called to the material in the record of the criminal case commencing at page 938, line 13, and ending on page 939, including line 7. The mark is under line 9, Mr. Bromley, but the actual text of that subject-matter ends with line 7 on page 939.

Mr. BROMLEY. That is right, your Honor.

Justice STEPHENS. Let the record also show that 3355 the Court examined in connection with that same question, the transcript in the criminal proceeding commencing with line 6, page 886, and extending to and including line 14, on page 892.

In order that the basis of the Court's ruling shall fully appear in the record, the Court directs that all of that material be copied into this record. A part of it was read informally, but it is not all in the record, and we wish it there.

(The portions of the criminal trial record directed to be incorporated in this record by the Court are as follows:)

(Page 938, from line 13 to and including line 7 on page 939:)

Q. Didn't you have a discussion with the lawyers about the matter of whether or not this transaction couldn't take the form of an agreement by Calvin-Tomkins expressly to charge, as to resale prices, those fixed by Newark —

The COURT. Just one minute, Mr. Bromley. That wouldn't throw any light on the inquiry because it seems that the Government and defense, both, agree that as the Calvin-Tomkins was a wholly-owned subsidiary the Government is raising no question about the control of the Calvin-Tomkins Company so your question doesn't raise the point at issue at all.

Mr. BROMLEY. I didn't appreciate that the Government was raising no question about it.

3356 The COURT. That is my understanding.

Mr. KELLEHER. You were at the bench this morning, Mr. Bromley.

The COURT. Sir?

Mr. KELLEHER. That is correct, your Honor, you stated it this morning.

The COURT. That is my understanding.

(Page 886, line 6, to page 892, line 14, both inclusive:)

The COURT. I want to learn a little law. I am sure you gentlemen can furnish the law.

Is it agreed between counsel for the defense and the Government counsel that licensors and licensees were protected in their control of the price made by their wholly owned subsidiaries?

Mr. KELLEHER. I can explain that in this way: In the indictment we charge that sales, the control of the selling price of Calvin Tomkins was illegal, and made no reference to that charge in the opening to the jury. I am now prepared to tell the Court that we do not intend to press that as illegal because the question is a doubtful legal question.

The COURT. It is not in my mind, but if you think it is, it is all right with me. Don't misunderstand me, I am not going to press my opinion; if it is not the opinion of Government counsel. But I don't think that the permission

3357 which the Supreme Court gives—because they really made the law—to a licensor to fix the price that the licensee should make, extends to the wholly owned subsidiary, the licensee. But, if that is your view that is all right. That settles it, that disposes of the matter, as far as this case is concerned.

Mr. KELLEHER. I would like to say this, though, we are in a peculiar position this morning. Kelley Plasterboard—Mr. DeWitt wants to take the position that Newark was not responsible for Kelley Plasterboard from 1937 to 1939; then he wants to take the contrary position from 1939 on, the other position that Calvin Tomkins Company was an independent company and therefore, the acts, if any, in the conspiracy, were the acts of Calvin Tomkins and not the acts of the Newark. Now, I think we should get straightened out on that. I think we are entitled to show that Calvin Tomkins was a wholly owned subsidiary controlled by their price dictated as a result of the contract by Newark.

If they are going to take that position I think we have



got to go into it. We cannot do anything else, we have got to show they were controlled by contract and that they did fix their prices, and that whatever Calvin Tomkins did it did as the result of this contract by the U. S. Gypsum Company.

The COURT. As far as I know from that testimony—and I don't know what you can do—I understand that a wholly owned subsidiary can virtually act as an agent 3358 would act.

Mr. BROMLEY. The contract so provides.

The COURT. I know, but your contract doesn't extend your right, as a contract, a licensor may make—doesn't extend his legal privileges.

Mr. BROMLEY. Extends to agents.

The COURT. Sir?

Mr. BROMLEY. Extends to agents.

The COURT. I say, do you contend that a wholly owned subsidiary, as a matter of law, acts as an agent?

Mr. BROMLEY. Under this contract which says that, yes, sir. It would not have to be in this situation.

The COURT. What contract?

Mr. BROMLEY. Under the contract of January 3, 1939.

The COURT. Between whom?

Mr. BROMLEY. Between U. S. G. and the Newark Company, which says, "The acts of the Calvin Tomkins shall be considered to be the acts of Newark."

Now, that is pure agency, I claim.

The COURT. You mean that by that contract Newark legally notified Gypsum that this other concern, Tomkins, was its agent, is that what you mean?

Mr. BROMLEY. Yes, sir, and I concede to the position that that is the way we would consider it.

The COURT. It is not a question of how you consider it, it is a question of whether you had a right to con- 3359 sider it that way.

Mr. BROMLEY. I think clearly the Supreme Court doctrine extends to agents.

Mr. KELLEHER. If they were agents.

The COURT. If they were agents. You can't make them agents by saying so.

What I want to know is this, whether or not Gypsum had the right, because of the contract which Newark entered into with them, to assume legally that Tomkins was Newark's agent until you had notice to the contrary. Is that what you mean?

Mr. BROMLEY. I think we had the right to assume that Tomkins was Newark's agent in view of the statement in the contract.

Mr. KELLEHER. No, but the contract —

Mr. BROMLEY. The statement to that effect.

Mr. KELLEHER. Even in the contract, the contract recites the sale.

Mr. DEWITT. I think we all agree with you that the Calvin Tomkins Company was a subsidiary of Newark during —

The COURT. Of itself?

Mr. DEWITT. Of itself.

The COURT. That is all I wanted.

Mr. BROMLEY. I agree with you.

Mr. DEWITT. We agree with that.

The COURT. There has been so much talk about 3360 it I didn't know what was in your minds.

Mr. DEWITT. It is very confusing, I grant you, because of the succession of events, but I think we would all agree with you on that point.

The COURT. This question of agency will have to be developed, you know.

Mr. KELLEHER. But, here is my point now, I am put in this position, that one of counsel contends it is their agent, the other says, "Oh, no, they are not, they are wholly owned subsidiaries." That changes my conception of the whole thing.

The COURT. If you are between the upper and the lower strata the Court can't do anything.

Mr. KELLEHER. I merely point that out, those two conflicting planes necessarily make me reconsider my position as to any claim we make concerning this Calvin Tomkins Company, and any claims we might want to press under this indictment.

The COURT. Now, gentlemen, in order for me to rule intelligently I felt as if I ought to understand the conception of counsel as to the relationship of this subsidiary and that is all the information I wanted. You have given me the information. I have got what I wanted.

Mr. DEWITT. I agree with your Honor, but —

The COURT. You claim an agency existed?

3361 Mr. DEWITT. The contractual relations between the parties —

The COURT. Constituted an agency.

Mr. DEWITT. Yes, and put it in the position of a licensee.

The COURT. These various conversations rather indi-

cated to the Court that it was conceded on all sides that a wholly-owned subsidiary was an agent and I just couldn't swallow that and that is the reason I called counsel up.

Mr. BROMLEY. I would like the record to show this: I do not believe the licensee of a patent could form a wholly-owned subsidiary and have it do all the selling free of the restrictions of the licenses.

The COURT. You think as a matter of fact, as I understand it, that legally speaking the subsidiary must be considered as the agent. That is what you virtually say, isn't it?

Mr. BROMLEY. Yes, or must be bound by the license if it sells all the patented product that is made by its parent.

The COURT. Well, that seems to make sense.

Mr. HADDOCK. May I ask if that is your attitude also towards the Newark Plaster Company for the period during which Kelley was a wholly-owned subsidiary of Newark?

3362 Mr. BROMLEY. That question doesn't arise. Kelley made the board, Kelley manufactured the board.

The COURT. Of course, I am not ruling on it now, but Kelley was controlled by Newark, Newark owned all the stock of Kelley.

Mr. KELLEHER. Yes, they were the same companies for all practical purposes.

The COURT. All right.

(End of quotation from criminal record.)

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Mr. STEFFEN. For our protection, your Honor, I should like to make a very brief statement, that we do not concede that it was admitted at the criminal trial by Mr. Kelleher, that the sales of gypsum board to or through the Calvin Tomkins Company were not illegal under the Sherman Act.

It is our position that that was very broad, and that at most what Mr. Kelleher did was to state that they would not press the charge made in the indictment, which charged the Calvin Tomkins Company with being a manufacturing distributor whose resale prices had been controlled.

We visualize a number of different charges, and all that was before the court in the criminal case was the matter of resale price control. Here there are a number of other charges, and those sales may be illegal, as brought up under the other and different charges, such as price fixing, standardizing, and many others.

3363 Justice STEPHENS. Well, I think you made that

same statement, in effect, this morning, Mr. Steffen.

Mr. STEFFEN. I wish to save my exception.

Justice STEPHENS. Very well.

The Court understands that you did concede this morning, clearly, Mr. Steffen, that if Mr. Kelleher made the concession which the defendants are contending that he made, you would, in good faith, feel bound by it here in this case.

Mr. STEFFEN. I stated, and am glad to state again, that we will be bound by any admissions that Mr. Kelleher made.

Justice STEPHENS. Thank you.

We will recess until noon tomorrow morning at ten o'clock.

(Thereupon, at 4:10 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Friday, February 11, 1944.)

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3364 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 8017

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UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,

WASHINGTON, D. C., FRIDAY, FEBRUARY 11, 1944.

The above-entitled cause came on for further hearing at 10.00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.



Appearances (Same as heretofore noted.)

3371 Mr. STEFFEN. I would like to state just a word, I think.

I last night read Wigmore, Section 2104, which Mr. Bromley referred to, and I don't find that it has any particular bearing on this issue. Note carefully that the exhibit which we were offering was a letter written by Mr. Stephen Kelley. That was offered as an admission or a declaration on the part of Stephen Kelley, who was the President of one of the conspirators or alleged conspirators in this case. It was entirely complete as an admission, and required no further explanation at all. Therefore, the rule as stated in Wigmore would simply not apply, because it refers to a document which refers to another or which, for sake of completeness, must have another document presented.

Now so far as it constituted a declaration—and that is all it is being offered for—it was a complete statement.

Secondly, so far as the fairness is concerned, I think Mr. Bromley misconceived the situation. It isn't essential that he put in his letter in order to clarify the declaration. If he wants to question the declaration he should call Mr. Kelley,—and he, of course, can do that,—to determine whether or not Mr. Kelley's statement was made and what his understanding was. That puts him at no disadvantage at all.

Thirdly, we do not have the original of the letter, the carbon copy of which was offered.

3372 Justice STEPHENS. Did you say "do not" or "did not"?

Mr. STEFFEN. I said "do not," and we have never seen it.

Mr. BROMLEY. The Government has got it. It was returned by subpoena, by the Newark Plaster Company and by us, too.

Justice STEPHENS. The Court has given this matter consideration and has looked at such authorities as are available on the subject. They are not very helpful. There is no authority in this jurisdiction, and there seems to be no practice in this jurisdiction which is of an established character, so far as I can determine from discussing the matter with one of the trial judges here who has had extended experience in this jurisdiction.

In the statement in Jones I read yesterday, I omitted

to read one portion which should be called to the attention of counsel, and that is the portion at the bottom of page 551 under Section 293, in which the author states: "Of course, a party offering admissions of this character is not bound by statements favorable to the declarant." That is consistent with the concession Mr. Bromley made, that if you were required to introduce or did see fit to offer the reply to Exhibit 371, that is, the letter of September 29, 1936, purporting to be from the United States 3373 Gypsum Company to Kelley, you would not be bound by it.

If counsel are interested in the cases, the cases which seem to have some bearing upon the subject are *Fleishbein v. Thorne*, 193 Wash. 65; 74 Pac. (2d) 80; an English case, *Watson v. Moore*, 1 C & K 626. There a letter was offered which appeared to be an answer to one of the offerors. The latter was required to be offered with it.

In the *Thorne* case just referred to, "a party who attempts to establish a contract by correspondence can not put in evidence his letter to the adverse party purporting on its face to answer one from him without producing the previous communication or showing its loss and its contents."

There are other cases of some interest. *New Hampshire T Company v. Korsmeyer P & H Company*, 57 Neb. 784; 78 NW 303, where the Court held that "In offering a reply letter of opponent, the answered letter need not be offered where the former 'is fairly self-explanatory'."

The cases are not especially helpful, because they do not touch exactly the situation which we have here. We think the law is this: We think that in the orthodox situation where, for example, a contract is offered in evidence by a plaintiff, and the plaintiff has in his possession also a release of the contract, the contract and the release ought both come in at the same time, because otherwise the Court gets an untrue picture of the situation, there being 3374 no dispute as to the authenticity of the release. As to connected items of correspondence, or a contract consisting of two letters, both of the letters or both items of the correspondence ought to come in at the same time, there being no dispute that they do constitute the whole of an integrated legal act.

But we think, Mr. Bromley, that this situation is different from that. While it is true, as stated in Jones, and

while you conceded that the Government wouldn't be bound if it put in the answering letter, it would be denied the right to cross-examine with respect to the circumstances under which it was written,—in view of the charge of the Government that the price fixing arrangements are in the nature of a subterfuge, that the license agreements and the transactions connected with them are in the nature of a subterfuge.

Now the extent of cross-examination is within the Court's discretion, but the right of cross-examination is not. The right to cross-examine is absolute. It seems to us since the Government in this case charges that the agreements, license agreements, and transactions related to them are in the nature of a subterfuge, that to require it to put in this reply at the present time rather than having it come in through the defendants would, technically at least, deprive the Government of the right of cross-examination. The situation is different from 3375 the ones I have mentioned of a more orthodox character, because there there is no dispute as to the connected portions of correspondence or as to two parts of a contract, or a contract and its release, being of an integrated nature and both being written in good faith.

Here there is a charge by the Government that the reply is not in good faith, and the Government is entitled to try and prove that. Now in this particular situation, the insistence upon the right of cross-examination seems quite attenuated because, with Henning dead, it seems unlikely that the letter could come in through the defendants by anyone who might have personal knowledge of the circumstances under which the reply was written by Henning. But we can't speculatively say that the letter might not come in under circumstances which would give the Government a substantial advantage of cross-examination to which it is legally entitled.

Therefore, we think that we can not insist upon the Government putting in this reply of September 29, 1936, as a part of its case, even though it wouldn't be bound by it. But we want to add this, that we think where the Government takes documents, as it is asserted here that it has out of the possession of the defendants, it is under very solemn responsibility to keep possession of them and 3376 see that they are returned to the defendant if they are a necessary part of the defendant's case. Other-

wise, the Government would be in a position to deprive a party of what it is entitled to with respect to the trial of its own case, and we do not intend to have this case presented—and we don't suggest that the Government is trying to present it, but we certainly do not intend to have it presented—in a partial manner. We are going to look at the whole truth before we get through with this case, and we expect the Government to produce the original of that document or, if it can't do that, to take some fair steps towards aiding in the getting in of a copy of the reply, because we are not going to be bound by technical rules to the point where we look at this case in a partial fashion. We must know the whole facts upon which both sides rely before the case is closed.

Has Exhibit 371 been offered?

Mr. STEFFEN. Yes, I believe so.

Justice STEPHENS. And have Exhibits 372 and 373 been offered?

Mr. STEFFEN. Yes, they were offered, I am sure.

3377 Justice STEPHENS. The Court now rules that the Government may now introduce Exhibit 371, and it is received in evidence without the necessity of putting in, at the same time, the letter of September 29, 1936, purporting to be Kelley of the Kelley Plasterboard Company from the United States Gypsum Company.

(The document marked as Government's Exhibit No. 371 was received in evidence.)

Justice STEPHENS. The Court wishes to hear a little further discussion with respect to Exhibits 372 and 373.

You contended, Mr. Steffen, that Exhibit 371 was fully self-explanatory upon its face, and therefore was entitled to come in. But that is not true with respect to Exhibits 372 and 373. They both say, "We are enclosing a copy of our price list," or something to that effect, and in neither of them is the price list shown. So the letters are not clear on their face. What do you say with respect to that?

Mr. STEFFEN. I will make this statement, your Honor, that the Government subpoenaed, back in 1939 and 1940, documents from the Newark Plaster Company, and I think they also subpoenaed documents from Oakfield Gypsum Products Company, or from National, which had taken over Oakfield, and that particularly applies to Exhibit 373.

I think also the Government served a subpoena on the Paragon Plaster & Supply Company, which applies to Exhibit No. 372:

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As far as we have been able to find, we have not seen those price lists.

I am offering the witness here on the stand to testify as to what those price lists may have been, and what the practice of his company was in sending out price lists, which gives to defendants all the opportunity which I think the case permits of, to determine what the price lists were.

I want to say with regard to your Honor's other and earlier suggestion, that we will do everything we can to supply the defendants with all the papers we have received.

Justice STEPHENS. Thank you, Mr. Steffen.

We will defer ruling on Exhibits 372 and 373 until you have finished examining the witness.

Do you wish to be heard on 372 and 373 further, Mr. Bromley?

Mr. STEFFEN. I might suggest that Exhibit 374, I said yesterday evening, is in the same bracket, and I would like to offer it, to be ruled upon in conjunction with Exhibits 372 and 373.

Justice JACKSON. You were examining on Exhibit 374 yesterday, were you not?

Mr. STEFFEN. That is correct, but it has not yet been received in evidence.

Justice STEPHENS. Exhibit 374 is in still a different category. Our attention has not yet been called to 3379 any explanatory answer to Exhibit 374. Exhibit 374 does not seem to contain a reference to some other item such as a price list.

Mr. BROMLEY. No, it is not in the class of Exhibit 371 at all.

Justice STEPHENS. What do you say about Exhibits 372 and 373, Mr. Bromley—do you think they are distinguishable from the ruling we have made with respect to 371?

Mr. BROMLEY. Oh, yes, I think they clearly are, because both of them are letters with enclosures. There is a dispute between us as to what the enclosures were. I think it is probably plain from a reading of the letters themselves—at least from the way I interpret them—that what was enclosed was the usual price list which Kelley would send to any customer, notifying the customer what the customer would be called upon to pay for goods.

Both those letters say, "We are enclosing", as I remember, "our prices", and so forth.

Justice STEPHENS. That is right.

Mr. BROMLEY. Now I suppose the Government would contend, since it has offered these two exhibits right after Exhibit 371—Exhibit 371 being dated some six or more months prior to 372 and 373—that Exhibit 371 creates the inference that what Kelley sent to these manufacturing distributors was our USG price fixing bulletins. Now of course that should not have been done. It never was 3380 done by us. We wouldn't send them to anybody who was not a licensee. It should not have been done by Kelley because Oakfield was not a licensee, and had no business with our bulletins.

So there is a dispute here as to what the enclosures were. I say they were perfectly proper enclosures. Mr. Steffen is going to argue that they were improper. So he produces the letters, without the enclosures, and the witness has stated that he doesn't know anything about it, and of course he doesn't. It is Wileman's letter.

Mr. STEFFEN. The witness has not stated that.

Mr. BROMLEY. The witness may know about the practice of the company, but he doesn't know what these enclosures were, and I think they ought to be produced before the letters go in.

Justice STEPHENS. Well, my colleagues, I think, would like to hear more from the witness upon the subject before we rule, and I think I share their views, with respect to Exhibits 372 and 373. So the witness may take the stand and you may renew your objection to Exhibits 372 and 373 at the conclusion of the testimony of this witness.

Mr. BROMLEY. Before we proceed, I respectfully ask that the letter of September 29, not yet marked, which has been the subject, in part, of the Court's ruling as to Exhibit 371, be now marked as Defendants' Exhibit No. 19 for identification.

Justice STEPHENS. It may be so marked.

(The letter referred to was marked as Defendants' Exhibit No. 19, for identification.) 3381

Justice STEPHENS. If there is nothing further in the way of discussion, you may proceed to examine this witness.

Mr. BROMLEY. I should like the record to show, in connection with the marking of Exhibit 18 for identification, that I now formally call upon the Government to produce the carbon copy of that exhibit which it subpoenaed sometime in 1939, and which was turned over in response to that subpoena, from the files of the United States Gypsum Company.

Mr. KNUFF. I might answer Mr. Bromley —

Justice STEPHENS (interposing). The record may show that demand.

Mr. KNUFF. I might answer Mr. Bromley in the language that he used with me on the 19th, but I am not going to do so, in which he said that he was tired of preparing the Government's case. We could say that we are tired of preparing the defendants' case. But we will make every effort to get that.

Justice STEPHENS. Well, that seems uncalled for to the Court, Mr. Knuff, because if the Government is in possession of this document, the defendants cannot prepare their case unless it is returned to them.

Mr. KNUFF. They can subpoena it the same way as they suggested to us.

Justice STEPHENS. They ought not to be under 3382 the necessity of subpoenaing it if it is in the possession of the Government. The conventional practice, where parties are in possession of each other's documents, and where both parties are present in court, is for counsel to give formal notice to produce. Why put the Court to the trouble of sending out subpoenas in such a situation?

Mr. KNUFF. I agree with that, but when we made a request, he answered —

Justice STEPHENS (interposing). Let's not get into any tit-for-tat argument.

Proceed with this witness.

Whereupon, FREDERICK TOMKINS, a witness, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

DIRECT EXAMINATION (Resumed) by Mr. STEFFEN.

Q. May the witness be shown Government's Exhibit 374 for identification?

(Government's Exhibit No. 374 for identification was handed to the witness.)

By Mr. STEFFEN.

Q. Exhibit No. 374, Mr. Tomkins, was the exhibit we were discussing when the Court recessed yesterday, and I

3383 had asked you some questions as to what goods the Oakfield Products Corporation was selling, and

I think you stated that they were buying board and lath from you, and selling it to the dealer trade, is that correct?

A. That is correct.

Q. And in the course of selling to the dealer trade, it is of course necessary for Oakfield to quote prices to dealers?

A. I don't think you can sell anything without quoting prices.

Q. I asked you this question on page 3645 of the record:

"Q. And that dealer price is the mill price, plus freight, is it not?"

And you said, "Yes".

Then my next question was:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?"

I suggest that you might have meant to say, or that you did say, "So that they would quote the right price to the dealer?" Can you tell us what you meant to say there?

Justice STEPHENS. What page is that on?

Mr. STEFFEN. On page 3646, I believe. It starts on page 3645 and goes over to 3646.

I will show you the transcript, Mr. Tomkins.

(A copy of the transcript was handed to the witness. )

3384 The WITNESS. What I meant to convey in my answer and the way I understood the question, was that it would be necessary for Oakfield to know the dealer's price so that they would receive from the dealer the correct price that would still leave them their 12½ per cent discount intact, because if they did not add the freight increase to the dealer price, their commission or discount would have to absorb it, and they would then be at a disadvantage.

By Mr. STEFFEN.

Q. And, therefore, how would you like that sentence to read, "get the right price to the dealer", or "quote the right price to the dealer"?

A. I would like to have it state, "get the right price from the dealer".

Q. And that would entail that they would have to quote the correct price to the dealer, would it not?

A. In order to maintain their full discount, they would have to notify the dealer that his price would be increased by the amount of the freight rate raise.

Q. So that it would be correct to say that they would have to quote the correct price to the dealer, would it not?

A. In order to maintain their same margin of gross profit.

Q. Therefore you could say either, "quote to the dealer"



or, "get the price to the dealer"—is that correct?

A. Well, their interest was in getting the price from the dealer. In order to get a price from a 3385 dealer you have to tell him what price you are going to get.

Q. You have got to quote one to him?

A. Yes.

Justice STEPHENS. When you say "get a price from a dealer" you don't mean to get the mention of a price, but you mean to get money from a dealer?

The WITNESS. That is right, that is what I meant.

Justice STEPHENS. I wish you would explain this, if counsel have no objection, in terms of a concrete illustration. It is very difficult for me to understand it in these terms because it seems to me that the word "dealer" perhaps is being used in more than one sense.

Mr. STEFFEN. I will ask some further questions, but for purposes of clearing the record as respects the fourth and fifth lines of page 3646, the word "to" in the fifth line should be stricken, and the word "from" inserted; and the correction which I suggested this morning, in line 4, changing "get" to "quote", should not be made.

Justice STEPHENS. What correction do you suggest should be made in the fourth line?

Mr. STEFFEN. The witness has now stated that this sentence should be corrected by changing the word "to" in the fifth line to the word "from", so that the sentence would read: "So that it was necessary for Oakfield to know that there was an increase in price so that they would 3386 get the right price from the dealer".

Justice STEPHENS. Is that what you meant to say?

The WITNESS. Yes, sir.

Justice STEPHENS. That correction may be made.

Mr. BROMLEY. It seems to me this is not an example of a correction of the record. It is just like any subsequent examination in which the previous testimony is changed. I don't think the record should be changed, or else the subsequent testimony won't mean anything.

Justice JACKSON. His former testimony is merely clarified by what he says now.

Mr. BROMLEY. That is correct.

Justice STEPHENS. If we could all agree without reference to the witness, that the word "to" should be changed

to the word "from", then we could change the record. But since the record now shows the witness' own interpretation and correct construction of his own answer, there is no need of making any actual change in the record.

Let the record stand in its original words. It is perfectly apparent from a further examination what the witness means.

Mr. STEFFEN. Yes, your Honor.

By Mr. STEFFEN.

Q. I want to ask you some general questions, Mr. Tomkins, about the situation to which Government's 3387 Exhibit No. 374 pertains. The Court is interested in who you mean by the word "dealer." I don't know that "dealer" appears in the letter. But whom do you mean by "dealer"?

A. Well, a "dealer" would be—with reference to this letter—a customer of Oakfield Gypsum Products Company.

Q. And "dealers" would be what sort of people?

A. They would be building material supply firms.

Q. And mason supply firms?

A. Yes, mason supply or building material supply firms.

Q. And they would sell at retail?

A. Yes.

Q. To contractors and builders?

A. And consumers, yes.

Justice STEPHENS. What I would like to have the witness do, if counsel have no objection, is to take a particular example. The price, as I understand it, at which Kelley or Newark, when Newark took over Kelley, sold to Oakfield, was the price determined in the bulletins received from USG, is that right?

The WITNESS. Yes, sir, less a discount.

Justice STEPHENS. Yes.

The WITNESS. Yes, sir.

Justice STEPHENS. Now I would like to have you take a supposititious example, if you will, of a bulletin price, less a discount, and carry it through in terms of that 3388 freight increase, so that the Court will understand it by a concrete example—if no one has any objection to that.

Mr. BROMLEY. I think that is a fine idea. When the witness starts out he might make it plain that the United States Gypsum Company bulletin price was the dealer price, and work in the word "dealer" right along, so we will know what that means too.

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Justice STEPHENS. That is a little confusing, I think. You continue to speak of the bulletin price as the dealer price, and you are talking about the Oakfield price as the dealer price, and it seems to me that the term is being used in two different senses, and that might be explained by a concrete example.

Mr. BROMLEY. I think that is correct. I think the dealer price is the same price that is charged to the dealers and to manufacturing distributors, like Oakfield, except that the latter get a discount from the dealer price.

Justice STEPHENS. Have you any objection to having a concrete example given by the witness?

Mr. STEFFEN. No, I would be glad to have that done. I suggest that I might take up, out of order, some of the invoices that I have in the file, and we can get not only a hypothetical case, but an actual case.

Justice STEPHENS. Very well.

3389 (A document was marked as Government's Exhibit No. 375 for identification.)

By Mr. STEFFEN.

Q. I accordingly show you, Mr. Tomkins, what has been marked as Government's Exhibit No. 375 for identification, which consists of some five papers, the first being under date of September 27, 1937, purporting to be an office voucher; the second and third, being apparently office memoranda; and the fourth being an invoice to the Oakfield Gypsum Products Company, under date of September 27, 1937; and the fifth being an order under the same date, September 27, 1937.

I will ask you to examine these, Mr. Tomkins —

Justice JACKSON (interposing). So that we will have our numbers correct here, does the first one of those documents bear the figure "25" down in the lower right-hand corner?

Mr. STEFFEN. Yes.

Justice JACKSON. And the others follow in succession?

Mr. STEFFEN. That is right.

Justice JACKSON. You are not marking these separately, or are you?

Mr. STEFFEN. I am suggesting that we mark the first one, the office voucher, as Exhibit 375; the next memorandum as Exhibit 375-A; the next one as Exhibit 375-B; the invoice as Exhibit 375-C; and the fifth document as Exhibit 375-D.

Justice JACKSON. And the last one bears the small

3390 figure "29" in the lower right-hand corner?

Mr. STEFFEN. That is correct, your Honor.

Justice STEPHENS. Proceed.

(The documents referred to were marked as Government's Exhibits Nos. 375-A, 375-B, 375-C, 375-D, respectively, for identification.)

By Mr. STEFFEN.

Q. Will you tell the Court what these papers are, Mr. Tomkins—I am referring to Government's Exhibits 375, 375-A, 375-B, 375-C and 375-D.

A. Well, these are all the working papers in connection with a sale of gypsum lath, with the Oakleaf label, made to Oakfield Gypsum Products Corporation, and shipped to the United Clay Products Company in Washington.

The first document, marked with the figure "25" —

Q. (Interposing.) That is Exhibit 375?

A. Yes—it is just a shipping ticket. The next is the memorandum —

Justice STEPHENS (interposing). That bears the figure "26"?

The WITNESS. Yes.

Justice STEPHENS. I think it would be well to note that Exhibit 375 bears the figure "25" in the lower right-hand corner and that Exhibit 375-A bears the figure 3391 "26" in the lower right-hand corner. And hereafter it would facilitate matters if you referred to them by their exhibit numbers.

The WITNESS. Yes, sir.

Exhibit 375-A is a memorandum giving the car number in which the shipment was loaded; Exhibit 375-B is apparently a notice of shipment, giving the car number, the date, and the material; Exhibit 375-C is the invoice of Kelley Plasterboard Company to Oakfield Gypsum Products Corporation, billing the amount of the shipment; and Exhibit 375-D is the order received by Kelley Plasterboard Company from Oakfield Gypsum Products Corporation for this shipment to be made.

By Mr. STEFFEN.

Q. Now let's look at Exhibit 375-C. The name "Oakfield Gypsum Products Corp." indicates the concern to whom the sale was made, does it not?

A. It does.

Q. And over at the right-hand side it says, "shipped to United Clay Products Co., University Station, Washing-



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ton, D. C." That indicates the firm to whom the shipment was made and also the firm to whom Oakfield sold the shipment, is that correct?

A. United Clay Products is Oakfield's customer for this shipment.

Q. And they would be a dealer, would they not?

3392 A. They are a dealer.

Q. They are a dealer?

A. Yes.

Q. I notice the initials "F. T." after the word "Salesman"—what does that refer to?

A. Those are my initials and I believe they were put on to mark it as a "house account", not attributed to any salesman.

Q. The terms there, "2%—20 days on net after freight"—will you explain that?

A. That means that the discount of two per cent for cash payment within ten days was applicable only to the amount of the invoice covering the lath, and not to the freight.

Justice STEPHENS. In other words, you didn't give them a discount figured on the freight charge as well as the charge for the lath itself?

The WITNESS. No, your Honor.

By Mr. STEFFEN.

Q. Does "2%—10 days on net after freight" refer to ten days after date of invoice?

A. Yes.

Q. Not ten days after the first of the next month?

A. Well, I am not positive of that. We had that arrangement with some customers, but in this instance I am not sure whether it was ten days after date of invoice, or  
3393 ten days after the first of the following month. I think this was ten days from date of invoice. We would express it differently if it were ten days after the first of the following month.

Q. Would you say that your discount terms were fairly uniform, or did you make many exceptions?

A. We had two general discounts for cash payment. One was ten days from invoice, and one ten or fifteen days after the first of the following month.

Q. Now did this represent a carload shipment, Mr. Tomkins?

A. Yes—938 bundles is a carload of lath.

Q. And what is the weight of the shipment, can you tell from the invoice?

A. 41,022 pounds.

Q. What was the billing weight?

A. The billing weight?

Q. Yes.

A. It wasn't billed on a weight basis.

Q. What was the mill base price?

A. The mill base price was \$13 per thousand square feet.

Q. And what was the basing point?

A. Delawanna, New Jersey.

Justice STEPHENS. Before you go any further, explain what you mean by a "mill base price".

3394 The WITNESS. The mill base price was the price charged to the customer, to which the freight to destination was added, in order to make the delivered price.

Justice JACKSON. The price at the mill?

The WITNESS. The price at the mill, the f. o. b. mill price.

Mr. BROMLEY. In the interest of clarity, may I suggest to the witness that Delawanna was not the basing point. If you look at the invoice you will see that it is Philadelphia.

The WITNESS. That is a correction I accept, Mr. Bromley.

Mr. BROMLEY. That only makes it harder, I regret that I had to mention it, but there is no use in getting it wrong. (Laughter.)

By Mr. STEFFEN.

Q. Now will you explain the point Mr. Bromley raised, concerning Philadelphia as the basing point?

A. There was a gypsum board mill in Philadelphia, operating at that time, and the freight rate from Philadelphia to Washington was less than the freight rate from Delawanna to Washington. Consequently, the bulletin price for board delivered in Washington would be the Philadelphia mill base, plus freight from Philadelphia to Washington. Consequently, when a shipment was made —

Justice STEPHENS (interposing). Even though the board was actually made at Delawanna?

The WITNESS. That is correct.

By Mr. STEFFEN.

3395 Q. That is done in order that whoever ships into the Washington market would ship in and quote to dealers as identical price?

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A. I don't know why the mill base prices are set up.

Q. It does result in that, does it not?

A. I don't think I understand the question.

Q. My point is that anyone selling to this customer, the United Clay Products Company, would have to make the same quotation, would they not?

A. Any licensee under the license agreement would have to abide by it in making this or any other sale.

Q. So that if National were selling to this same customer, and National has one of its mills at Clarence Center, New York, it would have to quote the same mill base price of \$13, and add to that the freight from Philadelphia to Washington, is that correct?

A. Well, National would quote the Washington delivered price as shown in the bulletins.

Q. Wouldn't it be the same price as you quoted?

A. The bulletin prices in Washington are all the same. It is a uniform price.

Q. What I am getting at is that National's invoice would be written the same as this invoice, so far as the first item is concerned, would it not? That is, they would say, "Less 12½ per cent on \$13" as a base, and 3396 they would put in there as the price \$14.96 per thousand?

A. I am not sure that they would.

Q. Wouldn't it be required under the bulletins?

A. I am not clear whether the bulletins require that 12½ per cent be taken from the mill base, or whether it can be taken from the delivered price. I don't know how National would make up its invoice for this shipment. It might simply quote a delivered price basis, less 12½ per cent.

Q. Well, I recognize that you probably don't know how they would quote. You are clear, however, that they would reach a price of \$14.96 per thousand in quoting to the dealer in Washington?

A. If they observed their bulletin prices, they would come out with the same price.

Q. Now I want to know how you reach \$14.96, assuming you start with a base price of \$13.

A. I haven't calculated this. I imagine the \$14.96 is the \$13 price, plus the freight.

Q. From — ?

A. Philadelphia to Washington.

Q. And on what weight of board, that is what I am getting at next?

A. On 41,022 pounds of board.

Justice STEPHENS. Where do you get that figure?

Justice JACKSON. It is right on this exhibit, "Less Freight:—41022#".

Justice STEPHENS. Oh, yes, I see it.

Mr. BROMLEY. Isn't that \$1.96 per thousand feet?

The WITNESS. \$13 plus \$1.96—does that figure 19 cents per hundred pounds?

By Mr. STEFFEN.

Q. I think the calculation may work out that way.

A. It should. I am not sure—these shipments were all made under a weight agreement.

Q. All right, explain that.

A. Instead of having the railroad weigh every car of gypsum board that was shipped from the plant, the railroads would, from time to time, come in to our plant and weigh up samples of board in our warehouse, and we would come to an agreement with the railroad as to what the shipping rate would be on all cars shipped.

Q. That is on the actual weight of the board which you shipped?

A. On the actual weight, the average actual weight, I will say, of the board shipped. Some cars might actually weigh more than others. But it would average out.

Q. On  $\frac{3}{8}$ -inch lath—and "Oakleaf" lath is simply the trade name that you put on for the Oakfield people, is it not?

3398 A. That is right.

Q. It is the same lath as your lath?

A. Exactly the same.

Q. What does 1,000 square feet of your  $\frac{3}{8}$ -inch lath weigh, or what did it weigh back in 1937, could you say?

A. I don't recall what the weight was, somewhere in the neighborhood of 1,250 or 1,450 pounds per thousand square feet. I am not sure what the actual figure was.

Q. Well, isn't it true, Mr. Tomkins—I think it is—that you have two weights, one being the actual weight, which is what you are going to have to pay freight on when the shipment is made, and the other being an arbitrary weight which all the manufacturers have agreed upon as the billing weight; and that the \$1.96 is calculated on an arbitrary weight—is that correct, is that your understanding?

Mr. BROMLEY. I object to that as assuming facts not in evidence. There is no such agreement as that.



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Justice STEPHENS. Well, if the witness knows whether there is or not, he may say so.

Mr. STEFFEN. I may say that the facts are in evidence; Exhibit 33, page 306, would be one example of where they are using an arbitrary weight for billing purposes.

Justice STEPHENS. If the witness knows that he may say so.

By Mr. STEFFEN.

3399 Q. Are you familiar with that?

A. I am not familiar with that personally, Mr. Steffen. I do know that we did use the same billing weight on our sales of board, in all cases, that is on our  $\frac{3}{8}$ " board, regardless of the amount each car might actually weigh. It was always billed at a flat rate per 1,000 pounds.

Q. And was that what the freight was actually paid on, that weight?

A. I am not sure as to that. I don't know whether those weights were questioned or not, by the railroad.

Q. Let me give you this example—or let me ask you this question, rather—does your board weigh exactly the same as does the board made by National or USG or Certain-  
teed?

A. No, sir.

Q. There is a variance, is there?

A. Certainly.

Q. How do you quote your prices to dealers?

A. Our prices to dealers are usually quoted on a delivered basis.

Q. And you take a mill base price, in this instance here \$13, and you add to it the freight from Philadelphia to Washington, do you not?

A. I don't believe we do that in quoting to a dealer.

Q. In this case —

A. (Interposing.) In this case we were not quoting a dealer. Our invoice was going to a distributor.

3400 Justice STEPHENS. When you use the phrase "quoting to a dealer", what do you mean?

The WITNESS. If a dealer in Washington sent in an inquiry for board, we would give him a quotation which would be the delivered price in Washington, the price that he would pay for the board.

By Mr. STEFFEN.

Q. That would be \$14.96 per thousand here, would it not?

A. I assume so, yes.

Q. Well, what I am getting at is that if that price—and your bulletins all show that the price is the mill base, plus freight from basing point to destination—in order that you may get a uniform price to your dealer, you have to have a uniform billing weight?

A. Surely.

Q. And isn't it true, therefore, that there is an 3401 agreement in the industry that all board of a particular kind shall be priced on a uniform billing weight?

A. I know of no such agreement. We never had any such agreement.

Q. But you have always used a pricing agreement such as this in making sales through Oakfield, is that correct?

A. We have always billed the mill base at Oakfield. Now how much freight we have billed Oakfield, I am not sure, I believe it varied in many instances. In some cases Oakfield would want to sell board where there would be too great a freight absorption that we would have to make in order to make it attractive. In that case we would not assume all that freight absorption; we would make a special arrangement with Oakfield, possibly. We made no guarantee that we would pay the freight anywhere in the United States that Oakfield wanted to ship board to.

Q. I appreciate that. Can you tell us where you get that \$1.96 per thousand which is added to the mill base of \$13.00?

A. Obviously we get the \$1.96 a thousand to bring the \$13.00 mill base up to the bulletin price of \$14.96 for board delivered in Washington.

Q. You might explain at this time what you mean by "freight absorption".  
3402 A. Well, there is freight absorption in this instance.

Q. I would like to have you explain, on the basis of this invoice, what you mean by "freight absorption".

A. The freight from Delawanna to Washington is higher than the freight from Philadelphia to Washington. The price that is ultimately paid for the board in Washington is based on the lower rate from Philadelphia. Consequently, a mill shipping from Delawanna would have to absorb the difference between the freight from Philadelphia and the freight from Delawanna.

Q. And that is what you mean by the statement "less freight—\$77.94", is it?

A. No. That \$77.94—I don't know, I haven't figured that out. I don't know what that refers to, except the 41,000 pounds that were shipped, less the 19 cents a hundredweight freight charge. Now that was deducted from the amount of money that Oakfield had to pay us, because we assumed that freight expense.

Q. You assumed the difference in the freight between a shipment from Philadelphia to Washington and a shipment from Delawanna to Washington, is that correct?

A. As I say, I am not sure whether we did or not in this instance.

Q. That would be a normal illustration of freight absorption, would it not?

A. I think on shipments to Washington we probably absorbed the difference ourselves.

Q. The difference between the freight from Philadelphia to Washington and the freight from Delawanna to Washington?

A. That difference, yes.

Justice STEPHENS. Who actually paid the freight bill first, Oakfield?

The WITNESS. No, we paid the freight bill.

Mr. BROMLEY. Wait a minute, Mr. Witness. On this shipment United would pay the freight bill when it got the goods in Washington, wouldn't it?

The WITNESS. I would like to correct my answer. I am not sure whether we paid the freight bill, whether United Clay paid the freight bill, or whether Oakfield paid the freight bill.

By Mr. STEFFEN.

Q. It is possible that United Clay Products paid \$77.94 to the carrier, which would constitute the freight, apparently, from Delawanna to Washington, and that would be deducted from the invoice?

A. I don't know that that is the freight from Delawanna to Washington.

Justice STEPHENS. Actually, eventually the person to whom you sold, Oakfield, would pay such freight as you charged it, I assume? That is, I mean such freight as you required it to bear in view of your absorption of a part of the freight due to the difference in the basing points?

The WITNESS. Apparently in this instance Oakfield paid the \$77.94, because that is deducted from the \$400.

Justice STEPHENS. Oakfield paid it?

The WITNESS. Oakfield or United Clay.

Justice STEPHENS. I don't understand that.

The WITNESS. I am not clear —

Justice STEPHENS (interposing). I don't understand that. I should think if they paid it, it would not be deducted.

Mr. STEFFEN. It would be deducted.

The WITNESS. Yes, sir, if they had paid it —

Justice STEPHENS (interposing). You mean if they had first paid it?

The WITNESS. Yes. Then we would have to take it off the bill.

Justice STEPHENS. You mean you would be giving them a credit for it here?

The WITNESS. Yes. On the other hand, if they were not required to pay it, we would also take it off the bill.

By Mr. STEFFEN.

Q. I want to get one matter clear, Mr. Tomkins, and that is that whoever was selling to United Clay  
3405 Products Company in Washington, if he abided by the license agreement, would have to charge the buyer the \$449.04; is that correct?

Mr. BROMLEY. I object to that unless the question means the licensee, that it is limited to the licensee.

Mr. STEFFEN. I mean any licensee abiding by the terms of the license agreement.

Justice STEPHENS. The question will be so interpreted.

The WITNESS. Yes, I have already answered that.

By Mr. STEFFEN.

Q. And that is a price made up of the base price at Philadelphia, in this case apparently \$13.00, plus freight from Philadelphia to Washington?

A. Yes, I believe that is it. I don't know how the prices are set.

Q. And you agree that in order for that to be a uniform price, it has to be a uniform billing weight?

A. Yes, if it is billed on the basis of \$13.00 plus freight.

Mr. STEFFEN. I think we might take a recess at this time, unless you have some questions right at the moment.

Justice STEPHENS. Very well, the Court will be in recess for five minutes.

(Thereupon, a short recess was taken.)

Justice STEPHENS. Proceed.

3406 By Mr. STEFFEN.

Q. Coming back now to Exhibit 374, Mr. Tom-



kins, in the light of the illustration that we have in 375 and 375-A, B, C, and D, can you tell us whether that would be a transaction which would make it necessary for the Oakfield Gypsum Products Company to be aware of the increase in freight mentioned in the letter of April 2, 1938?

A. Well, an increase in freight would change the price at which we billed the Oakfield Company.

Q. And it would also change the price at which the Oakfield would want to sell United Clay Products in Washington?

A. If it intended to retain its full discount.

Q. And the practice on the part of Oakfield and Structural and Connecticut would be to retain their full discount where possible, would it not?

A. I assume it would, I don't know.

Q. Would it not also be necessary for Oakfield to know the increase in price so that they would not be undercutting the price at which other licensees, or licensees would be selling in Washington.

A. If Oakfield did not know what the dealer price was at any given time, it might either undersell or attempt to oversell.

Mr. BROMLEY. It is not crystal clear to me.

3407 Justice JACKSON. You mean the answer?

Mr. BROMLEY. Yes, sir.

The WITNESS. By "oversell", I mean charge more or less than the bulletin price. Unless it knew the bulletin price, it might charge any price.

By Mr. STEFFEN.

Q. And it was your purpose to keep Oakfield informed, for the benefit of Oakfield, and also to make sure that Oakfield was not undercutting prices; is that correct?

A. We didn't know what Oakfield was selling at to these dealers. We made no inquiry as to Oakfield's prices to its dealers.

Q. Do you keep fairly well versed on the prices to dealers?

A. Yes.

Q. And how many salesmen do you have in the field?

A. Well, at this time —

Q. (Interposing.) Or did you have at that time?

A. At this time we had maybe 10 or 15.

Q. And if it came to your attention that Oakfield or Structural or Connecticut were underselling yourselves, would you not call that to their attention?

A. Whenever such a question arose, we did ask Oakfield or Structural whether or not they were underselling.

Q. And it would be very important to you, and 3408 to the other licensees, to make sure that they were not undercutting the market price to dealers, would it not?

A. Well, it would be important if it were being done on a large scale.

Q. What would be the consequences, Mr. Tomkins, if Structural or Oakfield should persistently undersell USG or your own company?

A. They would get the business.

Q. They would get the business?

A. Yes.

Q. And how long would they stay in business?

A. I can't answer that.

Q. You mean that if Structural, for example, were selling in Philadelphia at 10 or 15 cents below the price at which USG was selling the same product, that you think they would continue to receive a source of supply?

Mr. BROMLEY. I object to that as speculative.

Mr. STEFFEN. There is very little speculation involved in that, Your Honor. We have a defendant on the stand, and I would like his opinion on it.

Mr. BROMLEY. How can he speculate what USG would do with regard to whether it would sell Oakfield or not?

Mr. STEFFEN. He can speculate as to what his own company might do or he can state what his own company might do.

Justice STEPHENS. Objection sustained. The 3409 question is speculative.

By Mr. STEFFEN.

Q. What would your company do if Oakfield or Structural were to buy from you at 12½ per cent discount and then sell below your dealer prices?

A. That would depend on the effect, if any, it had on our business, and by "our" I mean Kelley business. If it interfered with our business if they quoted a lower price to a dealer than we were selling directly, and took that dealer's business away from us, I don't think we would continue selling them very long.

Q. I don't think you would, either.

A. If it were not in connection with one of our own dealers, I don't think we would know about it unless it were brought to our attention.

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Q. And wouldn't it be brought to your attention by USG if it was a sale to a USG dealer?

Mr. BROMLEY. I object to that as speculative again.

Justice STEPHENS. Objection sustained. The Court doesn't foreclose you from asking if particular items of that sort were brought to the attention of Kelley by USG, but as to what USG would do is a purely argumentative question.

Mr. STEFFEN. We will have some further testimony upon that same subject, and I will defer further questioning until then.

3410 By Mr. STEFFEN.

Q. But it is pretty clear, as you stated, that if Oakfield or Connecticut or Structural were selling to your dealers at a lower price, you don't believe they would stay in business very long?

A. Whether it was board or anything else, no one would.

Q. That is right, I think "no one" is a proper answer.

And it is clear that Structural and Oakfield knew that, do they not?

Mr. BROMLEY. I object to that as speculative, too.

Mr. STEFFEN. The witness can answer. He has been in business a long while.

Justice STEPHENS. The Court will instruct the witness that if he had some communication or dealings with Oakfield or Structural which puts him in a position to know that they know it, he may answer; but if he is just speculating and reasoning from the general facts, that is a conclusion for the Court to reach, not the witness.

The WITNESS. My answer would be a speculation. I have no knowledge.

Mr. STEFFEN. I have certain further invoices that I would like to bring up at this time, Your Honor.

I now would like to show the witness Government's Exhibit No. 376, which purports to be an office  
3411 voucher under date of December 10, 1937, with the figure "30" in the lower right-hand corner; and 376-A, which is a memorandum; and 376-B, which is another memorandum; and 376-C, which is an invoice from Kelley Plasterboard Company to Oakfield Gypsum Products Corporation, under date of December 10, 1937.

(The documents referred to were marked as Government's Exhibits Nos. 376, 376-A, 376-B, and 376-C for Identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits Nos. 376, 376-A, B, and C, Mr. Tomkins?

A. I have.

Q. Can you tell us what they are?

A. Exhibit 376 is a list of materials covering an order from Oakfield Gypsum Products Company to ship a carload of lath to United Clay Products Company.

376-A is apparently a memorandum from Oakfield, instructing the Kelley Plasterboard Company to make such shipment.

376-B is the mill memorandum showing the shipment loaded in the car, with the car number given.

376-C is the invoice of Kelley Plasterboard Company to Oakfield Gypsum Company covering the shipment.

3412 Q. Do you recognize them as documents of the Kelley Plasterboard Company?

A. Yes, sir.

Q. I note that in Exhibit 376-C the f. o. b. term is "your yard", while in 376-B the f. o. b. term was "destination". Can you explain that?

A. No, sir, I don't understand what "f. o. b. your yard" means in this instance. This was a freight shipment, and I presume the "your yard" is the same as "destination". It meant the plant of the United Clay Products Company.

Q. This invoice, 376-C, calls for perforated lath, as well as Oakleaf lath. Was your company a licensee under license from USG to make perforated lath, do you remember, at this time?

A. Well, I am not sure of the time. We did have a perforated lath license.

Q. The Kelley perforated lath license is Exhibit 31 under date of June 23, 1937.

A. Then the answer is yes.

Q. Do you recall whether you were making perforated lath at this time?

A. Yes, sir, we were.

Q. When did you start making perforated lath?

3413 A. I think Mr. Kelley had started perforating lath just before we took the business over. My recollection is that he had built a machine for perforating.

Q. He built a machine?

A. Yes.

Q. You don't know the date?



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A. I don't know the date, and I am not sure that the machine was finished.

Q. What date did you take over?

A. May 1, 1937.

Q. The license agreement with USG is dated June 23, 1937.

A. That would have been at approximately that time that we began.

Q. That is, your testimony is that Kelley may have been making perforated lath before they took out the agreement with USG?

A. As I say, I am not sure whether he was or not.

Q. You recall that perforated lath, under the agreement, was selling at a 25-cent differential?

A. Yes, at one time it was.

Q. It indicates here that the perforated lath is sold on a basis of \$13.25, and ordinary lath on a basis of \$13.00.

A. That is correct.

Q. I now wish to show you Government's Exhibit No. 3414 377, which purports to be an office voucher dated November 18, 1937, with the figure "34" in the lower right-hand corner; followed by a memorandum, marked Exhibit 377-A; and a second memorandum, dated November 9, 1937, with the number "36" in the lower right-hand corner, marked Exhibit 377-B; and a third memorandum or paper, with the figure "37" in the lower right-hand corner, marked Exhibit 377-C; and a uniform straight bill of lading under date of November 18, 1937, marked Exhibit 377-D; and an invoice, under date of November 18, 1937, marked Exhibit 377-E.

(The documents referred to were marked as Government's Exhibits Nos. 377, 377-A, 377-B, 377-C, 377-D, and 377-E for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibits for Identification 377, 377-A, B, C, D, and E, Mr. Tomkins?

A. I have.

Q. And are they papers issued in the regular course of your business?

A. They are.

Q. What is the subject matter of the shipment?

A. These papers cover the shipment of a carload consisting of both plain and perforated lath to George H. Robinson & Sons in Alexandria, Virginia, for the account of Oakfield Gypsum Products Company. They include the order from Oakfield Gypsum Products

Company, the loading list, the bill of lading, and the invoice from the Kelley Plasterboard Company to Oakfield Gypsum Products Company.

Justice STEPHENS. Perhaps, for the convenience of later readers of the record, you had better designate what each paper is, Mr. Tomkins.

The WITNESS. Exhibit 377 is the itemized list of materials.

Exhibit 377-A is a memorandum giving the car number.

Exhibit 377-B is the order from Oakfield Gypsum Products Corporation.

Exhibit 377-C is the memorandum giving the car number, the date, and the quantity of material shipped.

Justice STEPHENS. That is a mill memo?

The WITNESS. That is a mill memo.

Exhibit 377-D is the uniform straight bill of lading covering the shipment.

Exhibit 377-E is a copy of the Kelley Plasterboard Company's invoice to Oakfield Gypsum Products Corporation.

By Mr. STEFFEN.

Q. Now referring to 377, Exhibit 377, and also Exhibit 377-E, can you tell us more clearly how the price was arrived at?

A. Well, that is shown clearly on 377. The plain 3466 lath was priced at \$15.07 destination. From that was deducted the 12½ per cent discount on the \$13 mill price.

On the perforated lath, the destination price was \$15.32. The mill price was \$13.25, from which the 12½ per cent commission was deducted.

Q. And that price of \$226.17 appearing at the top of Exhibit 377 was the mill price of \$13 plus the freight from Philadelphia to, in this case, Alexandria, Virginia?

A. Well, the \$15.07 price was the bulletin price for board sold in Alexandria, Virginia.

Q. I see.

And that bulletin price was arrived at by the addition of the base price of \$13.00 plus the freight from Philadelphia to Alexandria, Virginia?

A. I don't know that it was. That was the price that the bulletin called for.

Q. You don't mean that the bulletin had a price for lath delivered in the City of Alexandria, Virginia, of \$15.07? It had to be a calculation, did it not?

A. Yes, it would be a calculation made in the bulletin.

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Q. The bulletin would tell you how to make the calculation, but it wouldn't make the calculation?

A. What I am trying to bring out is that the bulletin would specify the weight on which the calculation would be based.

Q. There would be a uniform billing weight?

3417 A. There would be a weight, stated in the bulletin, that we were required to use, multiplied by the freight rate.

Q. And all licensees used the same weight for purposes of calculating this price?

A. Yes, it was a part of the bulletin price.

Q. Now on Exhibit 377-D, you have a weight given of 41,022 pounds. That is the actual weight or the stipulated weight of the shipment made, is it not?

Mr. BROMLEY. Which do you mean, actual or stipulated?

Mr. STEFFEN. I think it is either one or the other.

The WITNESS. I don't know which it is.

By Mr. STEFFEN.

Q. When you testified earlier, you stated that ordinarily when you make a shipment by carrier they weigh up your shipment and it appears on the bill of lading; or, where you are making a number of shipments as you do, the carrier will take a sample of your board and reach an average weight; is that right?

A. That is correct.

Q. So that this 41,022 was either the actual weight or the average actual weight of the board that you were shipping, is that correct?

A. Yes, I think it would have to be.

Q. They charge freight on actual weight?

3418 Mr. BROMLEY. Who does?

Mr. STEFFEN. The carrier does.

The WITNESS. They charge freight on the average weight.

By Mr. STEFFEN.

Q. That is the carrier?

A. Yes.

Justice STEPHENS. What is meant by the term "dunnage" on Exhibit 377-D?

Mr. STEFFEN. Yes, I might ask that, Mr. Tomkins.

The WITNESS. Dunnage would be the bracing material or packing material that is loaded in the car to keep the board from breaking. It is usually broken or imperfect board.

Justice STEPHENS. And you have to pay on the weight of that, also?

The WITNESS. Yes, the railroad charges for that.

By Mr. STEFFEN.

Q. I believe the amount of your dunnage, in terms of board, is fixed by the bulletins, is it not?

A. I don't recall.

Mr. STEFFEN. I would like to ask that the witness be shown Government's Exhibit No. 37, page 536. That is Bulletin 5 under date of February 24, 1939.

(Exhibit 37 handed to the witness.)

Mr. KNUFF. May I check and see that the witness 3419 has the right exhibit in front of him, please?

Justice STEPHENS. Yes.

(Exhibit checked by Mr. Knuff.)

By Mr. STEFFEN.

Q. That is a provision, Mr. Tomkins, of the bulletin regulating the size of the dunnage and how you should use it, and so on. Are you familiar with it?

A. I am now. This regulates the size of the dunnage and states that an excessive amount shall not be used.

Q. And does it define "excessive" at any point, do you know?

A. I have read it very hurriedly, and I don't see any definition of "excessive".

Mr. STEFFEN. I now wish to show the witness Government's Exhibit 378 —

Justice JACKSON. Has that a mark "55" down at the lower right-hand corner?

Mr. STEFFEN. Yes, sir. It purports to be an office voucher under date of August 14, 1937.

Justice JACKSON. If you will give us the connecting number, we can get it quickly.

Mr. STEFFEN. Very good.

Also Exhibit 378-A, which is numbered "56"; 378-B, which is numbered "57"; and 378-C, which is numbered "58", and which purports to be an invoice of the 3420 Kelley Plasterboard Company dated October 14, 1937.

(The documents referred to were marked as Government's Exhibits Nos. 378, 378-A, 378-B, and 378-C for identification.)

Mr. STEFFEN. Would Your Honors care to recess at this time?



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Justice STEPHENS Yes, the Court will take the noon recess at this time.

(Thereupon, at 12:15 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

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AFTERNOON SESSION

3421 (The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. Proceed, gentlemen.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of recess, resumed his testimony further as follows:

DIRECT EXAMINATION (Resumed).

Mr. STEFFEN. Will you show the witness, Mrs. Gillette, the documents which have been marked as Government's Exhibits 378, 378-A, 378-B, and 378-C?

(The exhibits referred to were handed to the witness.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit No. 378?

A. Yes, sir.

Q. And the attached papers?

A. Yes, sir.

Q. Are they papers from your company?

A. Yes, they are.

Q. Could you explain to the Court what Exhibit 378 is?

A. Exhibit 378 is an itemized list of materials of the Kelley Plasterboard Company, showing the shipment of a mixed car of perforated lath, plain lath, and neat  
3422 plaster, to United Clay & Supply Corporation, to their Baltimore yard, for the account of the Oakfield Gypsum Products Corporation, in October, 1937.

Q. And 378-C is the invoice?

A. Yes.

Q. Now I notice that on these papers you have sold a certain amount of plaster. Is that what you meant by white plaster, or is this a different type of plaster?

A. No, sir, this is the neat plaster, which was purchased by the Kelley Plasterboard Company.

Q. Is it handled any differently than if you were selling white plaster, which you manufactured?

A. Well, I don't know what you mean by "handled any differently".

Q. I mean, you sold mixed cars of board and plaster, did you, on occasion?

A. Yes.

Q. And would you have invoiced any other plaster in the same way, except as to the price, perhaps?

A. I think we would. In some instances we would separate our invoices, showing shipments of board products on one invoice and shipments of plaster or other products on a separate invoice.

Q. In this case, I notice it says "Less freight—3423 \$69.81", appearing on the invoice, which is Exhibit 378-C. That freight is for the whole car, is it?

A. I would assume so, yes.

Q. Could you say positively?

A. Well, I can't say positively. That appears on the material ticket. Apparently it is the entire freight charge that we made to Oakfield. Whether or not it covers the actual freight paid, I don't know. I assume it does.

Q. Do plaster and perforated lath take the same freight rate?

A. I don't know that they do in all cases. I am not sure.

Q. Do you handle all these matters of detail in your office?

A. No, sir, I do not.

Q. Who is the man with the Newark Plaster Company who does?

A. All of these calculations were made by Mr. Wileman.

Q. By Mr. Wileman?

A. Yes, sir.

Q. Is he still with you?

A. No, he is no longer with us.

Q. When did he leave?

A. He left in 1942, I believe, the summer of 1942.

Q. Could you tell us where he is, please?

3424 A. No, I don't know where he is now.

Q. I will now show you Government's Exhibit

No. 379 —

Justice JACKSON (interposing). Does that bear the number "89" in the lower right-hand corner?

Mr. STEFFEN. Yes, Your Honor.

It purports to be an invoice from the Kelley Plasterboard Company to Oakfield Gypsum Products Corporation under date of April 16, 1937.

I will also show you Exhibit 379-A —

Justice JACKSON (interposing). That bears the little figure "90", does it?

Mr. STEFFEN. Yes.

Also Exhibit 379-B, with the figure "91" in the margin; Exhibit 379-C, bearing the figure "92" in the margin; Exhibit 379-D, with the figure "93" in the corner; and Exhibit 379-E, with the figure "94" in the corner.

(The documents referred to were marked as Government's Exhibits Nos. 379, 379-A, 379-B, 379-C, 379-D, and 379-E for Identification.)

By Mr. STEFFEN.

Q. Have you examined Government's Exhibit for Identification 379, and the attached exhibits, Mr. Tomkins?

A. I have.

Q. And what are they, please?

3425 A. Exhibit 379 is an invoice from Kelley Plasterboard Company to the Oakfield Gypsum Products Corporation, covering the shipment of a car of plain gypsum lath, perforated gypsum lath, and metallized gypsum lath, to George H. Robinson & Sons, at Alexandria, Virginia, on April 16, 1937.

Mr. BROMLEY. Is that for the account of Oakfield?

The WITNESS. Yes, the bill is to invoice, it is an invoice to Oakfield.

By Mr. STEFFEN.

Q. That evidences a sale by Oakfield to the George H. Robinson & Sons Company?

A. This evidences a sale by us to Oakfield of lath which was consigned to George H. Robinson & Sons, Alexandria, Virginia, on Oakfield's order.

Justice STEPHENS. By "consigned," I assume you mean sent?

The WITNESS. Shipped, yes, sir.

By Mr. STEFFEN.

Q. And these do not show whether Oakfield actually sold to Robinson, but that would be the normal course?

A. I assume they did.

Q. Now what is meant by "Freight allowed to destination?"

A. That means that the Oakfield Gypsum Products Corporation would receive a credit for the amount of freight to destination, the amount of the freight

3426 shown on the invoice, which, in this instance, is \$90.35.

Q. And does that indicate that you, or Kelley Plasterboard Company, was absorbing that amount of freight?

A. That means that Kelley Plasterboard Company, or the customer, was paying that amount of freight. It had been paid, and Oakfield was not required to pay it on this invoice.

Q. I note, Mr. Tomkins, that there are certain bundles of perforated lath mentioned there. Was the Kelley Plasterboard Company making perforated lath at this time, April 16, 1937?

A. Yes, sir, I believe they were.

Q. And do you know how long they had been making perforated lath—this was just about the time that you took over the company?

A. Yes. I testified this morning that I thought they began making perforated lath just about the time we took the company over. Whether it was a little before or a little after, I am not sure.

Q. And you subsequently took out a license with the United States Gypsum Company to make perforated lath?

A. We did.

Q. That was dated—I think we brought out this morning—June 23, 1937. Do you remember that?

3427. A. Yes.

Justice STEPHENS. That was the license to Newark?

The WITNESS. No, that would have been a license to Kelley Plasterboard.

By Mr. STEFFEN.

Q. So for some period prior to the signing of the license, they were making perforated lath without a license?

Mr. BROMLEY. If he knows.

The WITNESS. I am not sure. Yes, I believe they were. I would like to check on that.

By Mr. STEFFEN.

Q. I will show you Government's Exhibit No. 31 to refresh your recollection on that.

(Government's Exhibit 31 handed to the witness.)

A. This is the agreement dated the 23rd day of June.

Q. And will you look at it to verify the signature?

A. Yes, this is correct.

Q. Is that signed by you?



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A. It is signed by Mr. Keady for the Gypsum Company and by me for Kelley Plasterboard Company, and is dated June 23, 1937.

Mr. BROMLEY. I move to strike out the answer "Yes", which I think the witness gave to the question, "Then Kelley was making perforated lath without a license?" I don't think he knows that.

3428 The WITNESS. That is the point that this does not clear up. I don't know whether, prior to the 23rd of June, the Kelley Company was making perforated lath. I would have to look that up. I can find out. But I am not clear on it.

Justice STEPHENS. Then the answer "yes" may go out as not being a correct indication of the witness' answer.

By Mr. STEFFEN.

Q. The invoice that I show you, Government's Exhibit 379, would indicate that Kelley was selling perforated lath prior to that time?

A. Yes, there is no question as to that.

Q. And could you tell from looking at the invoice whether they bought that perforated lath from some other place, or made it themselves?

A. There is no way of telling from the invoice.

Q. There would be no other way of them selling it unless they bought it?

A. They either bought it or manufactured it, yes, sir.

Q. And the price, I notice there, is \$13.25 mill price, which is maintaining the 25-cent differential which was obtaining at that time?

Mr. BROMLEY. I object to that as incompetent because calling for a conclusion. I don't think the  
3429 word "maintaining" is a proper word to put in the question.

Justice STEPHENS. Let us have the question.

(The question was read by the reporter.)

Justice STEPHENS. You mean—which was the price obtaining at that time—I assume?

Mr. STEFFEN. That is correct.

Justice STEPHENS. That word may go out, the word "maintaining."

By Mr. STEFFEN.

Q. We have perforated both license bulletins for this particular period. Could you tell from looking at those what the bulletin price was?

A. Yes, I can read the bulletin prices. (Laughter.)

Q. That is what I mean.

Justice JACKSON. Is there any question but what this is the bulletin price?

Mr. STEFFEN. I don't think so.

Mr. BROMLEY. No.

Justice JACKSON. Why take up so much time, then?

By Mr. STEFFEN.

Q. In regard to metallized gypsum lath, this invoice also calls for a certain amount of that —

Mr. BROMLEY (interposing). I should have said, in response to Judge Jackson's question, that there is no question but what this price is the same as the 3430 bulletin price.

Justice JACKSON. That is what I meant to imply by my question.

By Mr. STEFFEN.

Q. Now refer to the 157 bundles of metallized gypsum lath on the invoice, Exhibit 379. Was the Kelley Plasterboard Company making metallized board or lath at this time?

A. Not at this time.

Q. Do you know when they first started making metallized board or lath?

A. I don't know the exact date. I believe it was later in the summer of 1937.

Q. And when you took over the Kelley Plasterboard Company, did you ascertain how long they had been making metallized board, how long prior to the time that you took the company over?

A. The Kelley Company had not been making metallized lath.

Q. Excuse me—how long they had been selling it?

A. No, I don't believe I did.

Q. Where did they procure the metallized lath which they were selling?

A. I know that after the Newark Company took the Kelley Company over, that Kelley purchased some metallized board from United States Gypsum Company.

3431 Q. And that ran on until you started making it yourself, which you say was sometime in 1937?

A. I believe it was sometime in 1937, yes.

Q. And this price of \$22.00 mill base, is that the same as the license price?

A. Well, I haven't the license price here—I assume it is.

Mr. STEFFEN. Will you stipulate that that is the license price?

Mr. BROMLEY. I don't know what it was.

By Mr. STEFFEN.

Q. May I ask you one or two questions concerning metallized board.

Do you sell a great quantity of that?

A. No, we sell a very small quantity of it.

Q. It is sold at a proportionately high price, is it not?

A. Yes, sir.

Q. The sale of it right now is discontinued on account of the difficulty of getting foil?

A. We have been unable to get foil.

Q. Metallized board is used for insulation purposes?

A. That is correct.

Q. Is it ever used simply for decorative purposes?

A. I believe it has been used for decorative purposes.

3432 Q. For example?

A. In a playroom, or something of that nature.

Q. By turning the foil inside instead of toward the air space, it gives you a metallized surface having a decorative value.

A. (No response.)

Q. Now, Mr. Tomkins, you signed Government's Exhibit No. 31, which was the license to make perforated board?

A. I did.

Q. Did you make any examination of the patent situation covering perforated lath at the time you signed this agreement?

A. No, sir, I did not.

Q. Did you know at the time that the Schumacher Wall-board people out in California were making a perforated lath?

Mr. BROMLEY. I object to that as immaterial and irrelevant.

Justice STEPHENS. The Court doesn't see the materiality of it. It may be subject to some connection.

What is the point of it, Mr. Steffen?

Mr. STEFFEN. Well, the connection will be to show whether the witness, or the Newark Plaster Company, had made an investigation of other possible boards at the time. We will make a legal argument on two or three scores at the appropriate time. At the moment I wish to show sim-

ply—which I think is the fact—that Mr. Tomkins  
3433 took out the license, as he has just testified, without  
any particular investigation, simply because it was  
almost necessary to do so in view of the dominant position  
of the United States Gypsum Company, and that they were  
offering a uniform license.

Mr. BROMLEY. Well, he hasn't said anything like you  
said after the word "because", I am sure.

Mr. STEFFEN. Your Honor asked me what the relevancy —

Justice STEPHENS (interposing). We merely wanted to  
know the materiality. He answered definitely that he did  
not make any investigation of the patent situation.

Mr. STEFFEN. I understand that to mean —

Justice STEPHENS (interposing). Then you asked him  
about the Schumacher Company of California, if he knew  
they were making perforated lath, and we didn't see the  
relevancy or materiality of that; but it may have some  
relevancy, and I was trying to find out what you claimed  
it was.

Mr. BROMLEY. It seems to me he trespasses upon the  
rule as to validity already made by this Court.

Mr. STEFFEN. I would say that we are not offering it  
to test the validity.

Mr. BROMLEY. Then it can have no materiality.

Justice STEPHENS. We will receive it subject to a motion  
to strike, because we can't tell whether it is material until  
we hear it, apparently.

3434 By Mr. STEFFEN.

Q. Did you know at the time you signed Government's Exhibit 31, the perforated lath license agreement, that the Schumacher Wallboard Company was making a perforated lath on the Pacific Coast?

A. No, sir.

Q. Will you state, Mr. Tomkins, why you signed the perforated lath license agreement?

A. Well, I understood that other licensees had signed the perforated lath agreement —

Q. (Interposing.) Do you know just which ones you then understood had signed this agreement?

A. I think at that time I understood that the Ebsary Company, the Certain-teed Company, I am not sure about National—I think there was a question as to National —

Q. (Interposing.) I think they did not sign it.



A. I think my understanding at the time was that the National Company was the only company that had not signed it.

Justice STEPHENS. Had you finished your answer?

The WITNESS. Yes, sir.

By Mr. STEFFEN.

Q. And you derived that understanding from talks, did you, with people in the industry?

A. Yes, that was general knowledge in the industry.

3435 Q. And did you talk with Mr. Keady, for example, of United States Gypsum Company?

A. I think I discussed this at one time with Mr. Keady.

Q. And did you understand that there was to be a price differential maintained on perforated lath?

A. I don't recall whether I understood that at the time, or not. At this time, in June, apparently there was a price differential. At no time did we ever have any assurance that there were going to be price differentials. We knew what the fact was at the time.

Q. Then on January 3, 1939, the agreement between Kelley and USG concerning the perforated lath license was assigned to the Newark Plaster Company, is that not true?

A. Yes, that was assigned as of that date to the Newark Plaster Company.

Q. And you have since been making perforated lath, up until the time of the fire, is that correct?

A. That is correct.

Mr. BROMLEY. That license wasn't assigned, Mr. Steffen. That is why they took out a new license, it wasn't assignable.

Mr. STEFFEN. I think that is correct, Mr. Bromley.

By Mr. STEFFEN.

3436 Q. Now that new license you took out on January 3, 1939, provided for no royalty, did it?

A. I don't believe it did.

Q. It was a gratuitous license?

A. I would have to refresh my recollection on it.

Mr. STEFFEN. I should like now to offer in evidence Government's Exhibits 375 through and including 379-E.

Justice STEPHENS. That means 375, 375-A, B, C, D; 376, 376-A, B, C; 377, 377-A, B, C, D, E; 378, 378-A, B, C; and 379, 379-A, B, C, D, and E.

Is there any objection?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. The exhibits are received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 375, 375-A, B, C, D; 376, 376-A, B, C; 377, 377-A, B, C, D, E; 378, 378-A, B, C; and 379, 379-A, B, C, D, E, were received in evidence.)

Mr. STEFFEN. Now I would like to go back to Government's Exhibit 375-C for a moment. Please show it to the witness.

(Exhibit 375-C handed to the witness.)

By Mr. STEFFEN.

Q. This is the invoice we were talking about this 3437 morning.

Can you tell from looking at that invoice what the actual weight of your board was, at that time, per thousand square feet?

A. No, I couldn't tell from looking at this invoice. I can tell the amount of freight that was credited against the price to Oakfield, but —

Q. (Interposing.) I think all you have to do is to divide 41,022 pounds, which is the actual weight, by 30, and that gives you the weight per thousand square feet.

A. I am not sure that 41,022 is the actual weight.

Q. You said this morning it was either the 'actual weight or a very close approximation to your actual weight, which was agreed upon between you and the carrier as the average rate; isn't that correct?

A. Yes, but as I say, it may not have been the actual weight of this shipment. There were substantial variations in weight on different cars. But that, for practical purposes, I would say would give you the weight, by that division.

Q. It divides out to about 1350 or 1355 per thousand board feet—is that approximately right?

A. You mean 1350 pounds per thousand square feet?

Q. Yes.

3438 A. I would say that was somewhat lighter than the board actually was.

Mr. BROMLEY. The division gives 1365.

The WITNESS. I believe at this time our board weighed nearer 1400 than 1350 pounds. This may have been actual weight, I don't know.

By Mr. STEFFEN.

Q. If it were actual weight, it was 1360 or 1365?

A. Yes, and that sounds very light to me.

Justice STEPHENS. Didn't you say 1365, Mr. Bromley?

Mr. BROMLEY. It divides out as 1366.

Justice STEPHENS. Do you get a different figure, Mr. Steffen?

Mr. STEFFEN. No, that is correct, or roughly so.

By Mr. STEFFEN.

Q. Now let's for a moment assume that that is the correct figure,—and that the invoice would indicate that it was the correct figure,—can you tell by looking at the price bulletins what the arbitrary billing weight as of this time was, Mr. Tomkins?

A. Well, I haven't got the price bulletin. If I had, I could tell what the billing weight was.

Q. I will show you Government's Exhibit No. 33, at page 229.

A. This doesn't —

3439 Q. (Interposing.) If you will look in that box on over about half way —

Justice JACKSON. Half way through that big volume?

Mr. STEFFEN. No, across the sheet.

The WITNESS. This shows a billing weight for  $\frac{3}{8}$  inch wallboard of 1850 pounds per thousand feet that prevailed on March 21, 1931.

Justice STEPHENS. Where is that figure?

The WITNESS. Under the  $\frac{3}{8}$  inch gypsum wallboard.

Mr. KNUFF. May I get the right one for the witness to refer to?

Mr. STEFFEN. The witness has looked at the wrong page, Your Honor.

Justice STEPHENS. Yes, you may, Mr. Knuff.

Justice JACKSON. It is the middle of the book, then. (Laughter.)

Mr. KNUFF. That is page 299, Your Honor.

Justice STEPHENS. We have it.

The WITNESS. Yes, sir, that shows a billing weight of 1400 pounds per thousand square feet, and that is dated June 12, 1937.

Justice STEPHENS. That is  $\frac{3}{8}$  inch gypsum plaster lath, is that right?

The WITNESS. That is right.

Justice STEPHENS. That is in the 7th compartment of the second box from the top, is it not?

3440 The WITNESS. That is correct, yes, sir.

By Mr. STEFFEN.

Q. Refer to the text material in the box on page 299 of Government's Exhibit 33, and state, if you can, how the price is figured upon a sale of gypsum board in carload lots?

A. I am not familiar with figuring these prices. I assume that —

Justice STEPHENS (interposing). If you are able, from your knowledge of the business, to answer, do so. But if you are answering upon a pure assumption and inference, then you shouldn't answer, because we must know this accurately. Someone ought to be able to explain it who has had detailed familiarity with it. Perhaps your familiarity with this business is such that you could do it.

Justice JACKSON. I don't think the witness understands your question, Mr. Steffen. You asked him to refer to the text, didn't you? He is down at the table.

Mr. STEFFEN. I asked him if that text would enable him to tell how to arrive at the delivered price.

The WITNESS. That is exactly how it is arrived at.

Justice STEPHENS. Which part of the text are you referring to? Let the record show.

Mr. STEFFEN. That part of the text between the heavy lines on page 299, which reads that the "Delivered price is lowest combination of mill price plus freight from that mill to destination."

Justice STEPHENS. I see where you mean now, thank you.

By Mr. STEFFEN.

Q. Can you tell from that, Mr. Tomkins, how these prices on Government's Exhibit No. 375-C were arrived at—and by "these prices" I refer to the price of \$14.96 per thousand?

A. Yes, the lowest combination—which in this instance would be the Philadelphia mill price—plus freight from Philadelphia to destination, would be the delivered price at which the board was required to be sold.

Q. And that would give you, apparently, in this case, if these figures applied, it would give you the \$14.96 per thousand?

A. That is correct.

Justice STEPHENS. What does this phrase mean: "Delivered price is lowest combination of mill price plus freight from that mill"—what mill?



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The WITNESS. That would be the nearest mill to the destination.

By Mr. STEFFEN.

Q. Mr. Tomkins, are you sure it would be that, or would it be the nearest basing point mill?

3442 A. It would be the nearest mill that is listed on the price bulletin, or it would be, rather, the mill that carried the lowest freight rate to that destination.

Q. The lowest combination of mill based price plus freight rate from the basing point mill?

A. That is correct.

Q. And the basing point mills are listed here on page 299 of Exhibit 33?

A. That is right.

Q. Beginning with Acme, Texas, Boston, Massachusetts, and so on?

A. Yes.

Justice STEPHENS. If you read along to Philadelphia, where do you get the figure \$14.96?

Justice JACKSON. \$13.00 plus \$1.96.

Mr. STEFFEN. The \$13.00 is the mill base price.

Justice STEPHENS. And you add to that the freight from Philadelphia?

Mr. STEFFEN. On an arbitrary weight of 1400 pounds per thousand square feet.

Justice JACKSON. Does "arbitrary" there mean guess-work, or that it is an agreed weight?

Mr. STEFFEN. Agreed weight.

Justice JACKSON. When you say "agreed", is it something that the railroad accepts as being the average weight?

3443 Mr. STEFFEN. No.

Justice JACKSON. I don't know what "arbitrary" means, then.

Mr. BROMLEY. I don't think "arbitrary" is a good word. It is a weight which we agree upon with the railroad, and then put in our bulletin, and we impose that on the licensees. We say, "You have got to bill on that weight." Now, you will notice here that on a billing weight of 1400 pounds, if the freight rate were 14 cents from Philadelphia to Washington, it would work out \$1.96. Now we know that the freight rate, as shown by the invoice from Delaware to Washington, was 19 cents, so the freight rate from Philadelphia to Washington was probably 14 cents, and that

works out exactly—1400 pounds billing weight, 14 cents freight rate, which makes \$1.96 per thousand feet.

Justice JACKSON. When you say 14 cents, you don't mean that the freight per thousand isn't \$1.96, do you?

Mr. BROMLEY. No —

Justice JACKSON (interposing). That is what I mean.

Mr. BROMLEY. The 14 cents is per hundred.

Justice STEPHENS. That is \$14 per thousand.

Justice JACKSON. That is not weight, that is feet.

Mr. BROMLEY. Let me start over again. The rate is 14 cents per hundredweight. A thousand feet of board weighs 1400 pounds —

3444 Mr. STEFFEN (interposing). That is an arbitrary weight.

Mr. BROMLEY. Not at all, it is the weight we set in the bulletin. 1400 pounds times 14 cents a hundredweight is \$1.96 per 1400 pounds, or \$1.96 per thousand feet.

Justice STEPHENS. I see.

This 1400 pounds is the bulletin figure which you set?

Mr. BROMLEY. Yes.

Justice STEPHENS. You say you impose that. Will you explain that? What do you mean when you say you "impose that"?

Mr. BROMLEY. In order to fix the delivered price at which these licensees must sell their customers, we, as licensor, say: "You must charge a price which is made up of a mill base price"—in this case \$13.00—"plus the freight from the nearest basing point mill to the destination."

Now if we allowed each licensee to base his price on the actual weight of his board, each one of the prices of our licensees would be different. So we tried to arrive, ourselves, at an arbitrary weight figure, which is what we judge is about what the board that is being made at the time weighs, in the industry, and we say, "In order to calculate the delivered price, in order to arrive at that part 3445 of it which is freight, use 1400 pounds as the weight."

Then if you all do that, you will all come out with the same price, which we are trying to fix."

And that is about what the railroads do, too. They don't weigh every car. They arrive at an approximate weight. They do that by agreement with all of us.

Mr. STEFFEN. I move that those last remarks be stricken out as argument.

Justice STEPHENS. They are just illustrative. We are trying to find out what the system is.

Mr. BROMLEY. So that the delivered price in this case is \$13.00 per thousand feet, plus freight of \$1.96 per thousand feet, and the thousand feet weighs 1400 pounds, for the purpose of determining a price.

By Mr. STEFFEN.

Q. Well, in this particular case, Mr. Tomkins, it would seem that the actual weight of the board was about a thousand pounds less than the weight at which it was billed. If it were billed on a basis of 1400 pounds, it would be 42,000 pounds for the shipment.

A. Correct.

Q. And the actual weight was, according to the railroad and the Kelley Plasterboard Company, who agreed upon that weight, 41,000, approximately, including dunnage.

A. I don't know whether there was any dunnage. There is no bill of lading with this shipment.

3446 Q. We don't have that. There ordinarily would be dunnage, would there not, in a car?

A. Not necessarily in a straight carload of lath.

Q. I want to ask a question, Mr. Tomkins—did your board ever exceed 1400 pounds?

A. In actual weight?

Q. Yes.

A. Oh, yes, I imagine it did.

Q. And to your knowledge, do some of the other manufacturers make a board, or were they making in 1937, a board weighing more than 1400 pounds?

A. Yes, I think some board weighed over 1400 pounds at that time.

Q. And it is your understanding that Mr. Bromley's statement is correct, that in order to get a uniform delivered price it was necessary to agree upon an average or arbitrary billing weight for 1,000 square feet of board?

Mr. BROMLEY. I didn't say it was necessary to agree upon it. It was something we imposed as a condition.

Mr. STEFFEN. All right, it was necessary to have a uniform weight which all licensees and the licensor would use as a billing weight?

The WITNESS. It don't know whether it was necessary to have it. We had it.

3447 By Mr. STEFFEN.

Q. I see.

Now in the case of this particular shipment, the customer was paying a price greater than he needed to have paid if

the price were calculated on the actual weight; is that not correct, as a mere matter of mathematics?

A. Well, the customer was paying a delivered price.

Q. That is right. If you had charged him, the customer, the mill base price of \$13.00, plus, we will say, a rate of 14 cents from Philadelphia to Washington based on actual weight, the price would have been lower than it was in this case, would it not?

A. You mean the credit for freight would have been higher?

Q. No, I mean if you could have been permitted to charge mill base price plus 14 cents per hundredweight on the actual weight of the board, instead of on this arbitrary weight?

A. Yes, if the bulletin price, in other words, had been lowed —

Q. (Interposing.) Just a moment, the bulletin price is fixed at \$13.00, mill base.

A. That is part of the bulletin price.

Q. The rest of it to be freight.

A. That is right.

3448 Q. And the freight is based upon an arbitrary weight of, in this case, 1400 pounds?

A. Yes, that is correct. We were required to add freight at the rate of 1400 pounds per thousand feet of board.

Q. Even though your board didn't weigh that much, didn't weigh 1400 pounds.

A. It didn't make any difference what the board weighed. It might have weighed less or more.

Q. That is what I wanted to get clear. In this case the freight was charged from Philadelphia to Washington, D. C.?

A. That is correct.

Q. And somebody had to absorb the difference, because the freight from Delawanna to Washington, D. C., was greater?

A. Right.

Q. Suppose that your mill had been in Baltimore, and you were shipping into Washington, would you have based it again on the same place, Philadelphia?

A. I think I would have trucked it in.

Q. Probably, but let's assume, for this illustration, that you ship a carload from Baltimore to Washington, what would be your basing point?

A. If I had a mill in Baltimore, I would expect to have



that mill serve as a basing point. I don't know what  
3449 the price would be.

Q. By what right would you expect to have that?

A. I wouldn't build a mill in Baltimore if I knew I was going to be at a freight disadvantage in shipping to Washington.

Q. Who stipulates the freight situation?

A. The licensor.

Q. And is there any control on your part as to that?

A. Well, there is the control as to whether or not I would build the mill.

Q. That is right. Are you familiar with the list of basing points?

A. Yes, sir.

Q. Are those basing points all places where USG has mills?

A. I don't know.

Q. Well, do you see Clarence Center among them?

3450 Mr. BROMLEY. I object to this as immaterial. It commences to sound to me as an attack on the basing point system which has been the subject of vast litigation, and still is, but which I believe not to be in issue in this case.

Justice STEPHENS. What is the purpose of this examination, Mr. Steffen?

Mr. STEFFEN. We think the basing point system is in issue in this case.

Justice JACKSON. What is your theory as to that?

Mr. STEFFEN. Well, your Honor, our contention is that the licensor has imposed upon the licensees, as Mr. Bromley would put it; or that the licensees agreed to have the licensor impose upon them, as we would state it, a whole system of marketing gypsum board. I am just barely getting into the details of how they price and how they base upon one point rather than another. The whole matter is, to our way of thinking, a complete restraint of trade going much beyond anything that is permitted under the pricing that is recognized in the General Electric case.

The General Electric case provided, as we saw it, in a fairly simple way, that a single licensor could license a single licensee to make Mazda lamps, and the court said that in conjunction with that there could be price fixing.

In this case we are contending that the defendants have gotten together to regulate the entire business of manufacturing and distributing gypsum board, and gypsum products; and they have imposed, as Mr. Bromley says—or the group have gotten together and  
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agreed upon—a number of practices such as an arbitrary basing point system, which we wish to call to your Honors' attention as being a definite restraint of trade, and as being a regulation going much beyond anything permitted in the General Electric case which, as I have said, is the defense relied on here.

I would like to make the further point —

Justice STEPHENS (interposing). You needn't do so. We think the examination is not improper for the reason that the charge in the complaint is that the bulletins were sent out under the license agreements, and the prices were based on the bulletins, or the prices followed the bulletins, and the bulletins are in evidence and show some sort of basing point system. We think the Government is entitled to explain to the Court what it is—and that is what you are apparently doing?

Mr. STEFFEN. I am trying to do so, your Honor.

Justice STEPHENS. Very well.

By Mr. STEFFEN.

Q. For purposes of illustration, Mr. Tomkins, assume that your mill was between Philadelphia and Washington, located in Baltimore or at some point between Washington and Philadelphia—would you base then on Philadelphia?

3452 A. Let me answer that this way. If I were a licensee, obligated to sell at bulletin prices, I would base it on whatever those bulletins required me to base at that time.

Q. That is correct. And under the bulletins as they were in effect on June 12, 1937, Philadelphia would have been the closest basing point provided?

A. Philadelphia was the basing point in 1937.

Q. That is right.

A. Correct.

Mr. BROMLEY. Closest to what?

Mr. STEFFEN. Closest to Washington.

The WITNESS. To Washington.

By Mr. STEFFEN.

Q. What I am getting at is that in such event you would charge the customer in Washington the \$13.00 mill price, plus the freight from Philadelphia to Washington, notwithstanding that your mill was closer to Washington and the freight might be less?

A. Well, if this bulletin —

Q. (Interposing.) If this bulletin had applied?

A. If this bulletin were exactly the same as it is now, that would be the nearest basing point to Washington still.

Q. That is right. The point I am trying to make, if you agree, is that if your mill were closer to the point of destination than the basing point mill, you would still have 3453 to pay freight, or charge the customer freight, from the basing point mill to destination, even though the actual freight were less.

Justice STEPHENS. That is assuming that there was a mill between Baltimore and Washington?

Mr. STEFFEN. Between Philadelphia and Washington.

Justice JACKSON. And assuming that you had the same bulletin?

The WITNESS. Yes, and assuming there was no other basing price on the bulletin.

Mr. STEFFEN. We have other illustrations, your Honor, which are perhaps more in point. I just wanted to get Mr. Tomkins' idea on this.

By Mr. STEFFEN.

Q. Now I would like to show you, Mr. Tomkins, Government's Exhibits 372 and 373 for Identification which we were talking about yesterday afternoon.

I gather from looking at Exhibits 372 and 373 that these have to do with trucking sales rather than with carload shipments, is that correct?

A. They deal with both. They eliminate certain counties from the trucking area, which would mean that they would then be in the railroad freight area.

Q. You have said a lot of things there. What do you mean by "trucking area"?

3454 A. The area in which the bulletins quote delivered prices by truck:

Q. Well, is this the situation, that around New York, around Boston, around Buffalo, and around Chicago, and such metropolitan centers as those, there are certain areas in which there is a delivered price for truck deliveries?

A. That is true as to the New York City area, that is the only one I am familiar with.

Q. And you don't go through this performance of having a mill base price and then adding freight from the mill to destination; the license bulletins provide a fixed delivered price by truck, in those instances?

A. Correct.

Q. And do those license buildings stipulate just how far that truck area extends?

A. I believe they do, I think they give it by counties.

Mr. KNUFF. I think the exhibit you have before you Mr. Tomkins, is only Exhibit 33, isn't it?

The WITNESS. Yes.

Mr. KNUFF. I don't believe that will show it.

The WITNESS. No, I don't think this does show it. My recollection is that trucking areas were defined in certain price bulletins.

By Mr. STEFFEN.

Q. And they were defined, you would say, by counties?

3455 A. By counties; and I think in New York by boroughs in addition, possibly.

Q. Then the area around New York, for example, is all marked out geographically, each zone or area having a fixed price, is that correct?

A. A delivered price, yes.

Q. A delivered price—by truck?

A. By truck.

Q. And when you say here, therefore, that you are "eliminating Berks and Lancaster Counties, Pa., and Delaware, Greene, and Columbia Counties, New York, from the trucking area on Gypsum Board," you mean you are restricting somewhat that delivered price area?

A. Well, those areas in New York State would be served by up-State mills, not by New York City plants.

Q. Well, were they formerly in the truck delivered price area?

A. I assume they were; otherwise this letter wouldn't have been written.

Q. And they would be served from the Buffalo area?

A. Presumably; and Berks and Lancaster counties, in Pennsylvania, presumably would have been served from the Philadelphia mills.

Q. And when you say that you are eliminating those counties from the trucking area, you mean that you are no longer trucking into those areas, and that there-  
3456 fore, if you are selling to Oakfield and making shipments to Oakfield's customers, that they couldn't be handled on the former delivered price basis, is that correct?

A. I don't believe we ever trucked into these areas.

Q. What was the purpose in saying that they were being eliminated, then?



A. I can't answer that —

Justice STEPHENS (interposing). Just a moment before you go any further. Do you mean Oakfield? Neither of these exhibits-refers to Oakfield.

Mr. STEFFEN. Let me clear that up.

By Mr. STEFFEN.

Q. Referring to the Paragon Plaster & Supply Company, do you know any reason why you should send a letter of this sort to them?

A. I don't know anything about either of these letters.

Q. Was not the Paragon company affiliated with the Oakfield company?

A. The Paragon Plaster & Supply Company in Scranton owned some stock in the Oakfield Gypsum Products Corporation, I believe.

Q. And the Oakfield Gypsum Products Corporation sold plaster to the Paragon Plaster & Supply Company?

A. Yes, they did at one time.

3457 Q. And the Oakfield Gypsum Products Corporation bought board from Kelley?

A. That is right.

Q. And did they sell it to Paragon Plaster & Supply Company?

A. They did, they sold board to them.

Q. And did Paragon act as a jobber or a dealer, or do you know?

A. Paragon Plaster & Supply acted in some cases as a jobber and in some cases as a dealer.

Q. So it would be pertinent to them, in their jobber capacity, to know what the prices were to be to dealers in this area, would it not?

A. Well, yes, they would be interested in dealer prices in the area in which they were selling, on all products.

Q. Surely. Now let's take the next sentence, Mr. Tomkins. It says: "The prices as shown for these respective Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only."

Now that is the sort of thing that we were just talking about, is it not, where you take the mill base price and add the freight to destination?

A. Well, that means that in the future, prices would be based on the regular mill basing point plus freight method.

Q. Which we have just discussed?

3458 A. That is correct.

Q. What is meant by "minimum quantity 7500 sq. ft."?

A. Well, that, I assume, applies to the minimum quantity permitted to be shipped in a pool carload.

Q. Do you mean a pool carload?

A. Yes, I mean a pool carload.

Q. The minimum was much higher than that, was it not, for a carload?

A. I am talking about a pool carload. That is a carload going to several dealers.

Q. For purposes of the record explain what a "pool car" is, Mr. Tomkins?

A. A pool car is a full carload of board, carrying the full carload price, which is consigned to several dealers, so that each dealer gets the benefit of the lower freight rate without being required to take a full carload of material.

Q. And it is a requirement, is it not, of the licensor, that licensees must sell in full carload lots, whether straight, or mixed or pool?

A. On freight shipments?

Q. That is right.

A. I am not sure that that is a requirement; I don't believe that it is.

Q. I think the bulletins will bear out that it is in most areas.

3459 Mr. BROMLEY. That is a question of freight rates, Mr. Steffen, not a question of bulletins.

By Mr. STEFFEN.

Q. Let me get this clear for my sake and for the Court's sake. That 7500 square feet, as you understand it now, is the minimum quantity that any one dealer might take in a pool car, is that right?

A. That is the only bearing I can see that the 7500 square feet has to this letter, that it would apply to the minimum quantity he would have to take in a pool car.

Justice STEPHENS. Do you mean that he must take that much, or might not take more?

The WITNESS. He could not take less than 7500 square feet.

By Mr. STEFFEN.

Q. Let me now ask you with regard to trucking generally. During 1937, 1938 and 1939 what was the minimum truck load that you sent out of your Newark board mill?

A. Our board mill was in Delawanna, and I believe the

minimum quantity was 7500 square feet.

Q. Now let's explain what that means. Was that a regulation of the licenser?

A. Yes, I believe it was.

Q. And what does it mean; exactly.

A. It means that we could not make a delivery to a dealer of less than 7500 square feet, at one time.

3460 Q. And if he only wanted to get 5000 square feet you had to tell him that you were sorry but that you couldn't deliver it by truck?

A. He would have to increase the quantity or we would not make the delivery.

Mr. BROMLEY. That was all subject to that price, at that price.

The WITNESS. I don't recall whether there was a provision that we could make a surcharge for a lesser delivery, or a higher price.

Mr. STEFFEN. There is no provision in the bulletins fixing that surcharge, is there?

The WITNESS. It is not fixed, and I am sure it could not be collected.

By Mr. STEFFEN.

Q. It boils down to the fact that in making truck deliveries the licenser had required you to deliver, whenever selling a dealer, not less than 7500 square feet.

A. I believe that is correct.

Justice STEPHENS. Let us take the afternoon recess.

(Whereupon, a short recess was taken, after which the hearing was resumed.)

3461 Mr. STEFFEN. I believe Exhibits 372, 373 and 374 have been offered, but have never been passed upon. I would like to reoffer them at this point.

Justice STEPHENS. Are they objected to?

Mr. BROMLEY. Exhibits 372 and 373 for identification are objected to as immaterial and incompetent, for the reasons heretofore stated.

Justice STEPHENS. On the ground that they are incomplete because they lack the enclosed price lists, is that what you mean?

Mr. BROMLEY. Yes, sir.

We object to Exhibit 374 only on the usual ground.

Justice STEPHENS. Exhibit 374 is received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Governments Exhibit No. 374 was received in evidence.)

Mr. STEFFEN. I would like to point out, your Honor, that Exhibits 372 and 373 were each introduced in the criminal trial, so there is no question as to their genuineness, their identification.

Justice STEPHENS. There is no objection on the ground of identification.

What price lists do you claim they refer to, the bulletins?

3462 Mr. STEFFEN. Let me ask the witness.

By Mr. STEFFEN,

Q. Mr. Tomkins, these letters, Exhibits 372 and 373, say, "Prices as shown for these respective counties", and so on—those are prices at which the Kelley Plasterboard Company would sell in those particular areas, are they not?

A. I don't know, Mr. Steffen. I don't know what it meant in either of these letters by "our price list." I don't know what lists were sent.

Q. Let me ask it this way. You were sending price lists to Structural and to Oakfield and to Connecticut—you testified to that yesterday.

A. From time to time price lists were sent to those companies.

Q. And those prices were what prices, Mr. Tomkins?

A. Those prices were the prices at which we were selling our products to dealers.

Q. That is right. And if Oakfield were to sell to their dealers in those localities, you wanted them to know what your prices would be to those dealers, is that not right?

A. Well, they would want that information, they would want to know what the dealer prices were.

Q. And those prices that you were sending them then were the bulletin prices for sales to those dealers in those areas.

A. The bulletin prices were the dealer prices.

3463 Q. That is right. And you were sending them, therefore, to Oakfield and to Structural and to Connecticut?

A. Yes, but I don't believe we were sending them the actual bulletin prices. I believe we were sending, as these letters state, our price lists.

Q. Now let's get clear how you made up your price lists which you sent to Structural and Oakfield and Connecticut.



A. Our dealer price list would show our prices to dealers for all products. Now our prices to dealers for board products were bulletin prices. Consequently, our dealer price list, as to board products, would be bulletin prices for board sold to dealers.

Q. And therefore, the only prices that could be referred to here in Exhibit 372 and Exhibit 373 would be your bulletin prices to dealers?

A. Yes, they would be the bulletin prices to dealers.

Justice STEPHENS. Do you mean by that that you sent the bulletins out to them, or the prices which were the same as the prices in the bulletins?

The WITNESS. I don't know which we sent. I believe as these letters state, they are "our price lists", and that they were not actual bulletins which were sent. I believe they were Kelley Plasterboard Company's price lists.

By Mr. STEFFEN.

Q. As a matter of fact, it would be very difficult for Oakfield to know what to do with the bulletins 3464 if they received them, would it not?

Mr. BROMLEY. I object to that as speculative.

Justice STEPHENS. Sustained.

Mr. STEFFEN. I think, your Honor, that the witness has clarified it sufficiently so that we can say that the prices, or the price lists, rather, referred to in Exhibits 372 and 373, are prices referred to in the bulletins, and would be the prices at which the Newark people would sell to dealers. They obviously didn't go through the calculation of having a base price, and then adding to it the freight from a basing point, and so on.

By Mr. STEFFEN.

Q. You gave simply the delivered price to the dealer, is that correct?

A. Yes, because that was the price that we were going to charge Oakfield, less a discount. It was the only way we could advise them what their price was.

Justice STEPHENS. We think the exhibits should be admitted in evidence. They are sufficiently explained to be admissible. The defendants may cross-examine with respect to them, or offer contrary material.

They are received in evidence, that is, Exhibits 372 and 373.

Mr. BROMLEY. Subject to the usual objection.

3465 Justice STEPHENS. Yes, subject to the usual reservation again, with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 372 and 373 were received in evidence. (Not admissible so far as declarations of Oakfield and Paragon because neither Oakfield nor Paragon were charged as being co-conspirators.))

By Mr. STEFFEN.

Q. I now show you, Mr. Tomkins, Government's Exhibit No. 380, which purports to be a letter from you to Mr. Eldred under date of November 17, 1937.

Justice JACKSON. Bearing the figure "65" in small figures down at the bottom of the page?

Mr. STEFFEN. I don't find that, your Honor.

Justice JACKSON. It appears on mine.

Justice STEPHENS. Was that Exhibit 207 in the criminal proceeding?

Mr. KNUFF. It was Grand Jury Exhibit 207.

Mr. STEFFEN. And Exhibit 157 in the criminal proceeding.

Justice STEPHENS. This is going to be numbered what?

Mr. STEFFEN. Exhibit No. 380.

(The document referred to was marked as Government's Exhibit No. 380, for identification.)

By Mr. STEFFEN.

Q. Do you recognize Government's Exhibit 380 for identification as a copy of a letter which you sent to Mr. Eldred?

3466 A. Yes.

Q. Who was Mr. Eldred?

A. Mr. Eldred was the president of the Oakfield Gypsum Products Corporation.

Q. Had you known him for some time?

A. Yes, I had known him for some years.

Q. The first sentence in the letter refers to a Harry McCormick—who was he?

A. Harry McCormick was sales manager for the Structural Gypsum Division of American Cyanamid.

Q. And had you known him for some time?

A. Yes, I had known him for some time.

Q. Did you have a luncheon with Mr. McCormick at or about this time?

A. Yes, I did.

Q. The letter referred to a shipment of Oakleaf Lath delivered directly to a job. Did you discuss the matter with Mr. McCormick?

A. Yes. I have no recollection of this, other than what is stated in the letter. I undoubtedly did.

Q. Well, did he make a complaint about the matter?

A. I don't know that he made a complaint. He informed me that there had been some excitement or discussion among Philadelphia dealers, owing to the fact that a shipment of Oakleaf lath had been delivered directly to a job.

3467 Q. Why would there be any excitement among the dealers if there was a shipment made directly to the job?

A. Well, that would put the dealers who had to make their own deliveries to the job at a disadvantage, as compared with a dealer for whom the manufacturer or distributor was bearing the cost of delivery.

Q. And your conversation indicated that someone from the Oakfield Gypsum Products Corporation had made such a delivery?

A. Ah Mr. McCormick stated was that some Oakleaf lath had been delivered. He didn't say in his conversation with me who delivered it.

Q. Now if this were in a truckload, the orthodox way of handling it would be for the truck to deliver the material to the dealer, put it in his warehouse, and then have it trucked out to the job, is that the correct procedure?

A. That was the normal procedure.

Q. And although you were selling board and going right by the job at which it was to be used, your trucks would have to go clear to the dealer and then have the dealer ship the stuff back to the job?

A. Yes, sir, our trucks —

Mr. BROMLEY (interposing). Just a moment. I object to that as incompetent, and calling for a conclusion in so far as the use of the phrase, "your trucks would have to go" is concerned.

3468. Mr. STEFFEN. Leave out the "have to" and make it they would go.

Justice STEPHENS. That correction may be made.

By Mr. STEFFEN.

Q. Now under the bulletins do you understand that you have to make deliveries to the dealer and not directly to the job?

A. To the dealer's warehouse.

Q. And you would not be permitted under the United States Gypsum Company license bulletins to deliver directly to the job, is that correct?

A. I believe that is in the bulletins. I am not clear as to all these bulletin provisions.

Q. And that is what caused the excitement here in Philadelphia back in November, 1937?

Mr. BROMLEY. I object to that as incompetent, because I don't know what "that" means.

Mr. STEFFEN. The fact that there was an alleged delivery made directly to the job.

By Mr. STEFFEN.

Q. Is that correct?

A. Well, what Mr. McCormick told me was that a delivery of Oakleaf lath had been made directly to a job, and that it had upset some of the dealers in Philadelphia.

3469 Justice STEPHENS. Delivered by whom?

The WITNESS. He didn't say.

By Mr. STEFFEN.

Q. But to cause excitement it would have to be delivered either by Oakfield or Structural, or someone of the licensees?

A. Any manufacturer, yes.

Q. And you took it upon yourself to write to Mr. Eldred concerning the matter?

A. That is correct.

Q. Did you subsequently talk with Mr. Eldred about it?

A. Yes, I believe I did have a conversation with him at a later date.

Q. Do you recall when you had that conversation?

A. I don't recall the date, no, sir.

Q. Do you recall where?

A. I believe it was in New York City.

Q. And it was sometime after November 17, 1937?

A. That is right.

Q. Will you relate what your conversation with Mr. Eldred was?

A. My recollection of it is that Mr. Eldred said he had inquired of his salesman in Philadelphia as to whether this delivery had been made directly to the job, and that his salesman had denied it.

Q. He made that investigation after your conversa-



tion, or had he already made it when you talked  
3470 with him?

A. Well, I think he had my letter before I spoke to him. I think at the time of our conversation he had made an investigation and told me that the delivery had not been made to the job. That is my recollection.

Mr. BROMLEY. May it please the Court, I think I should have objected to that question on the usual ground, since it appears, I now see, to be a declaration of a third party and therefore not binding on the defendants. I make, therefore, only the usual objection in so far as the conversation between this witness and Eldred is concerned, and ask that that testimony be received subject to the usual reservation.

Justice STEPHENS. Is it being offered as a declaration of Newark or Kelley?

Mr. STEFFEN. On one part, yes.

Justice STEPHENS. It is received, subject to the usual reservations with respect to declarations of alleged co-conspirators.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 381, to which is attached Government's Exhibit No. 382, the first being a letter from Mr. Bartlett to Mr. Tomkins, under date of December 27, 1937; and the second, Exhibit 382, being a complaint.

(The documents referred to were marked as Gov-  
3471 ernment's Exhibits Nos. 381 and 382, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 381 and 382, Mr. Tomkins?

A. I have.

Q. And did you receive Exhibit 381?

A. Yes, sir.

Q. And what is Exhibit 382, if you know?

A. Exhibit 382 is a copy of a complaint on the sale of patented gypsum wallboard, in violation of the license to manufacture and sell.

Q. And what was the nature of the charge?

A. The nature of the charge was that the "Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of \$14.00 per M, delivered to

job. Material is trucked direct from Delawanna, N. J. by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is \$14.10 per M."

Q. That was a complaint emanating from the Board Survey Company, was it?

A. That is correct.

Q. And who is the Board Survey Company?

A. I don't know who the Board Survey Company is.

This letter was written by Mr. Bartlett, the executive secretary.

3472 Q. And did you ever talk with Mr. Bartlett?

A. Yes, I did.

Q. Where?

A. I have talked with Mr. Bartlett in a number of places.

Q. Did you, at or about this time, talk to him about this complaint?

A. I believe we had some conversation about this complaint at or about this time.

Q. In New York?

A. I think it was in New York.

Q. And can you relate the conversation?

A. No, I simply have a recollection that he spoke to me about this complaint. I don't know whether at that time I had the answer to it, or not, from Oakfield Gypsum Products Corporation, and I don't remember any result of our conversation.

Q. Well, as a result of your conversation, did you make any further investigation of this matter?

A. Well, as a result of receiving this complaint, I did.

Q. Well, was it as a result of receiving this complaint that you got in touch with Mr. Eldred?

A. Yes. That, I am quite sure I did after I received this complaint.

Q. I will show you Government's Exhibit No. 383, which purports to be a letter of yours to Mr. Eldred, 3473 or a copy of a letter, under date of December 29, 1937, and ask if you can identify that?

A. Yes, this is a copy of my letter of December 29, 1937, to Mr. Eldred in connection with the complaint of the Board Survey Company, dated December 27.

(The document referred to was marked as Government's Exhibit No. 383, for identification.)

By Mr. STEFFEN.

Q. I now show you Government's Exhibit 384, which

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purports to be a letter from Mr. Eldred to you, under date of December 30, 1937.

A. Yes, that is the reply I received from Mr. Eldred, dated December 30, 1937.

(The document referred to was marked as Government's Exhibit No. 384, for identification.)

By Mr. STEFFEN.

Q. Now, did you —

Justice STEPHENS (interposing). Just a moment, let the Court read it.

Mr. STEFFEN. Excuse me.

Justice STEPHENS (after reading Exhibit No. 384). Proceed.

By Mr. STEFFEN.

3474 Q. Did you have any further talk with Mr. Eldred after this letter of December 28, 1937, concerning this matter?

A. Well, I saw Mr. Eldred frequently. I assume I did have some conversation with him.

Mr. BROMLEY. You mean about this matter; may I inquire?

The WITNESS. I have no recollection of any specific conversation about this matter, with him.

By Mr. STEFFEN.

Q. I now show you Government's Exhibit No. 385, which purports to be your report to the Beard Survey Company under date of January 3, 1938, and also a copy of your letter of January 3, 1938, addressed to Mr. Eldred, which is marked as Government's Exhibit 386.

(The documents referred to were marked as Government's Exhibits Nos. 385 and 386, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 385 and 386, Mr. Tomkins?

A. Yes, sir.

Q. And that is your signature on Exhibit 385?

A. That is my signature on Exhibit 385.

Q. And Exhibit 386 is a copy of a letter which you sent to Mr. Eldred?

A. It is.

3475 Mr. STEFFEN. I now offer in evidence Government's Exhibits 380 to 386, inclusive.

Mr. BROMLEY. We made only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked Government's Exhibits Nos. 380 to 386, inclusive, were received in evidence.)

By Mr. STEFFEN.

Q. At about this time, Mr. Tomkins, it was your understanding, was it not, that you were under some obligation or duty to see that Oakfield and Structural and the manufacturing distributors to whom you sold, should maintain prices?

A. Yes, I was under that impression at that time.

Q. And you therefore were endeavoring to see that the Oakfield Gypsum Company was maintaining prices and was also following out the conditions of the bulletins?

A. As to job deliveries, and maintenance of price, I was interested in seeing that Oakfield Gypsum Company observed the same requirements that we, as a licensee, were under.

Q. And did you, subsequent to this occurrence, take the matter up with your counsel?

A. I did.

Q. As to whether you had the right to require Oakfield, for example, to maintain the bulletin prices?

3476 A. Yes, sir, I did.

Q. And what did your counsel advise you?

A. He advised me that we had no such right, and from that time we no longer attempted to exert any influence.

Q. When you say that you have no longer attempted to exert any influence upon what Oakfield or Structural or Connecticut might do, do you mean to imply that you were not interested any longer in whether they maintained prices or not?

A. No, sir, the only time I ever took this matter up with any of them was where instances had been brought to our attention of violations. We never at any time inquired as to the prices at which they were selling, or made any effort to see that they sold at any particular prices, except for the occasions on which we had been put on notice that the violations had occurred.

Q. When you were put upon notice, who put you upon notice?

A. The Board Survey Company, in this instance.

Q. And the Board Survey Company acts as an investigating agency, or did at that time, for the United States Gypsum Company?



A. As to these instances, it did, yes.

Q. Do you know who made the reports to the Board Survey Company concerning alleged violations?

3477 A. I do not.

Q. Would it normally be other licensees?

A. I don't know.

Q. It wouldn't be dealers, would it?

A. I don't know; I should doubt it.

Q. Have you had occasion to report other licensees for not abiding by bulletin prices?

A. No, sir. To the best of my knowledge we never made any such report.

Q. I notice in the letter of Mr. Eldred that he suggests that perhaps the United States Gypsum Company itself is subject to criticism. Have you ever been acquainted with any violations of that sort?

A. No more than by this sort of a statement.

Q. I now show you Government's Exhibits Nos. 387 and 388, which purport to be, one an original letter addressed to Mr. Tomkins under date of May 17, 1938; and the other, a reply from Mr. Tomkins addressed to Mr. Bartlett, under date of May 20, 1938.

(The documents referred to were marked as Government's Exhibits Nos. 387 and 388, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibits 387 and 388 for identification, Mr. Tomkins?

3478 A. Yes, I have.

Q. Do you identify the letter of May 17, which is Exhibit No. 387?

A. Yes, I do.

Q. And is Exhibit 388 a copy of your reply?

A. Yes.

Mr. STEFFEN. I offer Government's Exhibits 387 and 388 in evidence, your Honor.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 387 and 388 were received in evidence.)

By Mr. STEFFEN.

Q. I note on Government's Exhibit 388, Mr. Tomkins that in the middle of the second paragraph you refer to

certain irregularities in connection with the sale of lath by Structural to dealers. Can you explain what those irregularities were?

A. I suppose those irregularities were either in connection with price or delivery, or both.

Q. You still, at that time, felt that you were under an obligation to see that Structural or Oakfield 3479 should maintain bulletin prices, and the terms and conditions of sale, did you not?

A. That is true, but that was not the reason for our discontinuing the sale to Structural. In fact, the irregularities were ones that interfered with our own business. They had nothing to do with the license bulletin requirements.

Q. Will you state what kind of irregularities they were?

A. Well, the Kelley Plasterboard Company at this time was selling its products in Philadelphia to certain dealers, and we were also selling to Structural Gypsum Company, which was selling our lath to dealers in Philadelphia. Where Structural Gypsum Company would sell lath below our regular dealer price in Philadelphia, it would interfere with our own business.

In addition to that, the sale of lath in Philadelphia to Structural, at a discount, was unprofitable because of the high cost of trucking. In effect we were absorbing the haul from Delawanna to Philadelphia, and when we added the expense of a long haul to the cost of the discount, it made the business unprofitable. So on both counts we considered it was bad business to continue selling Structural in the Philadelphia market.

Q. Looking at the first one, that is that there were irregularities in that they were underpricing or underselling you to dealers in Philadelphia, what you actually did was simply to take their business away from them 3480 in Philadelphia, is that it?

A. Well, we stopped them from taking our business away from us.

Q. In other words, you refused to sell them for delivery in Philadelphia?

A. That is true.

Q. And I think you testified this morning that if they had undercut prices in any other area, you would have refused to sell them in that area?

Mr. BROMLEY. I don't think he said that at all, if the Court please.

Mr. STEFFEN. I think very definitely he said this morning that if Structural or Connecticut or Oakfield were to undercut prices, he would discontinue selling to them.

By Mr. STEFFEN.

Q. Didn't you say that this morning?

A. No, sir, not in that way.

Q. What did you say?

A. I don't remember my exact words, but what I meant to convey was that if we were selling to any manufacturing distributor or any jobber at a discount, and that jobber or distributor took our material and sold it at a lower price than we were willing or able to sell, to our own customers, we would not continue selling him.

3481 Q. And that is exactly what the Structural was doing in Philadelphia?

A. Exactly.

Q. So you refused to sell them any longer?

A. That is correct.

Q. Now, I show you Government's Exhibit 389, which purports to be a letter from Mr. Kelley to the Board Survey Company under date of July 11, 1932; and also Government's Exhibit 390, which purports to be a copy of a letter to the Kelley Plasterboard Company from Board Survey Company, under date of July 1, 1932, and ask you to examine them, and then I will ask you some questions on them.

(The documents referred to were marked as Government's Exhibits Nos. 389 and 390, respectively, for identification.)

By Mr. STEFFEN.

Q. Have you examined Exhibit 389, Mr. Tomkins?

A. Yes, I have.

Q. And is that Mr. Kelley's signature?

A. That is Mr. Kelley's signature.

Q. Do you recall having seen this letter before?

A. No, sir, I don't recall seeing this letter.

Q. And you are not familiar with the matter that is being discussed in the letter?

3482 A. No, sir. This was five years before we had anything to do with the Kelley Plasterboard Company.

Q. I understand that.

Does your company now sell to the Dussol Company?

A. I don't believe so, I don't believe Dussol Company deals in wallboard now.

Q. I notice that the complaint is that George Dussol is hired on a commission basis by Mr. Kelley. Is that permitted under the price bulletins, do you know, Mr. Tomkins?

A. I don't know, I would have to look them up to see.

Q. Do you have any salesmen hired on a commission basis?

A. No, sir, we have not.

Q. Do you sell to jobbers?

A. To jobbers?

Q. Yes.

A. What do you mean by "jobbers"?

Q. By a "jobber" I mean, Mr. Tomkins, a man who buys in carload lots, or in quantities, from the manufacturer, at a discount, and sells to dealers at dealer prices—and I want to exclude either Oakfield or Structural or Calvin Tomkins Company.

A. I know of no one in that classification that we sell to.

Mr. STEFFEN. We now offer Government's Exhibits 389 and 390, your Honor.

3483 Justice STEPHENS. Is there any objection?

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. They are received, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Mr. STEFFEN. For the record, Exhibit 390 is a copy of a letter from Board Survey, addressed to the Kelley Plasterboard Company, dated July 1, 1932.

Mr. O'DONNELL. Did the witness identify Exhibit 390? I didn't hear him do so.

The WITNESS. No, I did not.

Mr. STEFFEN. It is circumstantially identified as being the letter to which Exhibit 389 is a reply.

Mr. O'DONNELL. I object to it, then, as not being properly identified.

Justice STEPHENS. Does the record show where you obtained these letters?

Mr. STEFFEN. Yes, sir, they came from the files of the Board Survey Company.

Justice STEPHENS. That is Exhibit 390, the letter of July 1st?

Mr. STEFFEN. Exhibit 389, which is the original letter addressed to Board Survey Company and Exhibit 390,



which is a copy of the letter sent to Kelley Plasterboard Company by the Board Survey Company, came from the files of the United States Gypsum Company.

3484 Justice GARRETT. Well, the witness stated that he didn't know anything in the world about them.

Mr. STEFFEN. The witness identified the signature on Exhibit 389.

Justice GARRETT. Yes, that is correct, Mr. Kelley's signature.

Mr. STEFFEN. And it is on the regular letterhead of Kelley, is it not —

Justice STEPHENS (interposing). Let us see the original exhibits, Mrs. Gillette, Exhibits 389 and 390.

(Thereupon, the documents in question were handed to the Court.)

Justice STEPHENS. The objection is overruled. Exhibit 390 is received in evidence as circumstantially identified, subject to the usual reservation concerning declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits Nos. 389 and 390 were received in evidence.)

Mr. STEFFEN. Your Honor, it will probably not be possible for the Government to finish the direct examination tonight. We have about fifteen or twenty minutes more, probably, and that of course will leave no time for cross-examination.

Justice STEPHENS. How extensive is the cross-examination going to be?

3485 Mr. BROMLEY. I should think a couple of hours.

I see no reason why Mr. Steffen can't finish out until four o'clock, and put in a full day, however.

Mr. STEFFEN. My reason is strictly personal. I am leading a double life. I have to get to New Haven. (Laughter.)

Mr. BROMLEY. I didn't appreciate that.

Justice STEPHENS. Well, it will be impossible for us to sit tomorrow in any event. We cannot sit on Saturday as all of us have other engagements. If you have to catch a train, we will not —

Mr. STEFFEN (interposing). I will carry on until four o'clock, if you desire.

Justice STEPHENS. If you can, we will be glad to have you, but if that will inconvenience you in catching a train, we will of course accommodate you.

Mr. STEFFEN. I think it might, your Honor.

Justice STEPHENS. Then we will adjourn at this time.

I am sorry that we will have to ask you to return, Mr. Tomkins.

Mr. STEFFEN. I want to make one statement. We have a brief to prepare, or a memorandum to prepare, in connection with Mr. Adams' memorandum, and I wanted to state to the Court that we won't have it ready before Monday.

Justice STEPHENS. Very well.

3486 Mr. STEFFEN. I am sorry, but we simply have had no time to get it together.

Justice STEPHENS. You will have it here Monday?

Mr. STEFFEN. Yes.

Justice JACKSON. That bears on the answer in the Beaver Products suit?

Mr. STEFFEN. Yes.

Justice STEPHENS. Is there anything else?  
(No response.)

Justice STEPHENS. If not, you may announce the recess until Monday at ten.

(Thereupon, at 3:55 o'clock p.m., an adjournment was taken until 10:00 o'clock, Monday, February 14, 1944.)

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3487 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 8017

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UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CBLÖTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
WASHINGTON, D. C., MONDAY, FEBRUARY 14, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a. m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3492 Justice STEPHENS. You may proceed, gentlemen. Mr. Tomkins, take the witness stand.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed).

Justice STEPHENS. I omitted one item, gentlemen; a correction, which I had better make before we proceed.

In the pages immediately preceding page 3760, discussion was being carried on in respect of Exhibits 372 and 373. Objection was made to the receipt of those exhibits, which had to do with the Paragon Plaster & Supply Company and the Structural Gypsum Division of the American Cyanamid Company. Objection was made to the introduction of those exhibits, so far as they were declarations of Kelley or Newark, unless subject to the reservation which is usually made, that they were received subject to the usual

3493 reservation with respect to declarations of alleged co-conspirators. The Court did make that reservation, but the Court omitted to make the ruling that those exhibits were not admissible so far as they were declarations of Oakfield or Paragon, because neither Oakfield nor Paragon were charged as being co-conspirators, and that statement should appear in the record as far as those two exhibits are concerned.

Now you may proceed.

By Mr. STEFFEN.

Q. Will you state for the record, Mr. Tomkins, what war work you are now engaged in?

A. I am employed by the Ordnance Department, which is under the Army Service Forces, in the War Department.

Q. Your company is still manufacturing gypsum board and gypsum plaster, is it not?

A. Yes, sir.

Q. I now want to show you Government's Exhibit No. 391, which purports to be a letter signed by Mr. Kelley

addressed to Mr. Henning, under date of June 1, 1932.

(The document referred to was marked as Government's Exhibit No. 391 for Identification.)

By Mr. STEFFEN.

Q. Is that Mr. Kelley's signature, Mr. Tomkins?  
3494 A. Yes.

Q. I now want to show you Government's Exhibit No. 392, which purports to be a letter from Mr. Kelley addressed to the Board Survey Company, under date of May 23, 1932.

(The document referred to was marked as Government's Exhibit No. 392 for Identification.)

By Mr. STEFFEN.

Q. Is Exhibit 392, Mr. Tomkins, written on the Kelley Plasterboard Company stationery, and signed by Mr. Kelley?

A. It is.

Q. I now want to show you Government's Exhibit No. 393 for Identification, which purports to be a copy of a letter from the Board Survey Company addressed to Mr. Kelley, under date of May 17, 1932.

(The document referred to was marked as Government's Exhibit No. 393 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with the letter of May 17, 1932, Government's Exhibit for Identification 393, Mr. Tomkins?

A. Only by having read it just now.

Q. You have not seen it previously?

A. I don't recall seeing it, I may have seen it.

Q. I now wish to show you Government's Exhibit No. 394, which purports to be a letter from Board  
3495 Survey Company addressed to Warren Henley, under date of May 9, 1932.

I also show you Government's Exhibit No. 395 for Identification, which purports to be a copy of a letter from Warren Henley, addressed to Mr. Frank Miller of the Board Survey Company, under date of May 2, 1932.

(The documents referred to were marked as Government's Exhibits 394 and 395 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with Mr. Warren Henley's signature, Mr. Tomkins?



A. No, sir, I am not.

Q. I now show you Government's Exhibit No. 396 for Identification, which purports to be a copy of a letter addressed to Mr. Kelley under date of March 22, 1932.

(The document referred to was marked as Government's Exhibit No. 396 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with the matter mentioned in Government's Exhibit 396, which you have just read?

A. No, sir.

Q. I now show you Government's Exhibit No. 397 for Identification, which purports to be an original letter from Mr. M. H. Baker addressed to Mr. F. M. 3496 Miller, Board Survey Company, under date of March 21, 1932, and referring also to the Reserve Lumber Company situation.

(The document referred to was marked as Government's Exhibit No. 397 for Identification.)

By Mr. STEFFEN.

Q. Are you familiar with Mr. Baker's signature?

A. Yes, sir.

Q. Do you identify the signature to Exhibit 397 as being Mr. Baker's signature?

A. Yes, that is Mr. Baker's signature.

Mr. STEFFEN. We now offer in evidence, Your Honor, Government's Exhibits 391, 392 and 393, the first two as being expressly identified by Mr. Tomkins, and the third, No. 393, as being circumstantially identified in that it is a copy of a letter to which the letter of May 23 is an answer.

Mr. BROMLEY. We make only the usual objection:

Justice STEPHENS. Have defendants' counsel seen these letters?

Mr. OLIVER. I haven't.

Mr. STEFFEN. I will say, Your Honor, that this whole file was left with the Clerk, last week sometime, in the usual way.

Justice STEPHENS. Do you wish to take time to look at them right now, Mr. Oliver?

3497 Mr. OLIVER. Not right now, but I will object to Exhibit 393 as not being properly identified.

Justice STEPHENS. They are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 391, 392 and 393 were received in evidence.)

Mr. STEFFEN. I should now like to offer Government's Exhibits 394 and 395. The argument in favor of their admission is perhaps a little slender. There has been no identification of Mr. Warren Henley's signature, and in fact I doubt if that is his signature. It seems to have been written by somebody else. The only identification is that it has been written on Certain-teed Products Corporation's stationery, I think there is no question about that —

Mr. ADAMS (interposing). As far as I am concerned, I will consent to their admission in evidence, subject to the usual objection.

Mr. OLIVER. I object to them on the ground that they haven't been identified at all.

Mr. BROMLEY. We make only the usual objection.

Mr. JOHNSTON. I want to join in Mr. Oliver's objection. It would certainly take a long stretch of 3498 imagination, under any rule of evidence, to say there has been any identification at all of these two exhibits, Exhibits 394 and 395. The witness has said he didn't know anything about them.

Mr. STEFFEN. I think that is correct. Mr. Adams has stated that he makes no objection to them. I don't know that that goes so far as to say that he will recognize the letter of May 2 as a letter written by the Certain-teed Products Corporation and, if so, that the letter of May 9 is a reply. They were taken from the files of United States Gypsum Company, and it makes no objection to their identity.

Justice STEPHENS. Do you concede, or do you not, Mr. Adams, that they are letters, Exhibit 395 written by Certain-teed Products Corporation, and 394 a reply thereto? Or do you simply make no objection on the ground of identification?

Mr. ADAMS. I think I can safely say that 395 is unquestionably a letter of Certain-teed Products Corporation. With respect to the reply, I can not say, because there is no copy in our files, and we understand that this copy came from the files of the United States Gypsum Company. But as to 395, I am quite sure that I can say it is a letter of Certain-teed. As to the other, I can not, but it appears, apparently, to be the reply.

3499 Justice STEPHENS. Mr. Oliver and Mr. Johnston, will you let us hear you a little further? If Mr.

Henley's signature had been identified by this witness or by anyone else familiar with it, then, consistently with previous rulings, that exhibit, No. 395, would have come into evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

Now here is counsel for Certain-tyed admitting that that letter was written by Henley. Why isn't that entitled to the same dignity in identification as a statement of a witness that this is Henley's signature? What do you say on that?

Mr. OLIVER. I think it is, Your Honor.

Justice STEPHENS. What do you say, Mr. Johnston?

Mr. JOHNSTON. If the Court please, I think it makes little difference to my client, and for the sake of harmony and so we might get along, I will withdraw my objection.

Justice STEPHENS. Very well. The exhibits, then, are received in evidence subject only to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 394 and 395 were received in evidence.)

Mr. STEFFEN. We now offer Exhibits 396 and 397. Exhibit 397 has been positively identified, and there can be no question about that. Exhibit 396 is only circumstantially identified. It is written the day after the letter of March 21, which is Government's Exhibit 397. It has to do with this whole matter of the warehousing situation with the Reserve Supply Company of Long Island. The copy came from the files of the United States Gypsum Company, and I think under the complete evidence rule, or whatever we might have along that line, it tends to give a picture of the whole transaction more clearly than if it were to be omitted.

Justice STEPHENS. It is not referred to in any other letter, is it?

Mr. STEFFEN. No, sir.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Is there any other objection by any other defendants' counsel to Exhibits 396 and 397?

(No response.)

Justice STEPHENS. Received in evidence, subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked as Government's Exhibits 396 and 397 were received in evidence.)

By Mr. STEFFEN.

Q. Government's Exhibits 391 to 397, which you have read, Mr. Tomkins, refer to a warehousing situation with the Reserve Supply Company of Mineola, 3501 Long Island. Are you familiar with that situation at all?

A. No, sir, not at all.

Q. Could you tell us what the nature of the complaint was?

Mr. BROMLEY. I object to that as incompetent. He says he doesn't know anything about it.

Justice STEPHENS. Do you know anything about it except as you have read in these letters?

The WITNESS. That is my only information.

Justice STEPHENS. Objection sustained..

By Mr. STEFFEN.

Q. Do you have any similar warehousing arrangements today with any dealers?

A. I don't know that this one was.

Q. As you have read it from the correspondence?

A. No, sir.

Q. Do you have any warehousing arrangements with dealers whereby you give them a certain amount of money if they will warehouse goods for you which you subsequently deliver to the trade?

A. No, sir, we do not.

Q. Is it your understanding that you may not have those under the bulletin regulations?

Mr. BROMLEY. I object to that as incompetent, because the bulletins are the best evidence.

3502 Mr. STEFFEN. I think the bulletins are the best evidence, Your Honor; but on the other hand, we have a defendant on the stand, whose understanding is very material, and I should like to have him state whether or not he understands that he is permitted to have warehousing arrangements.

Justice STEPHENS. I am of the view, Mr. Steffen, that although you are permitted to cross-examine this witness because he is a defendant or the officer of a defendant company, that doesn't make it proper for you to ask him questions the answers to which would violate the best evidence rule. As I understand the rule under which counsel can ask leading questions of an adverse witness, all it intends to do is to permit the asking of leading questions.



Now it is proper, after a witness has testified on direct examination to certain items, to ask what his understanding is in respect to them, because that goes to the reasonableness of his actions or his testimony. But I think the best evidence rule is not set to one side by Rule 43, which permits leading questions of a witness whom you have called. Since the bulletins are the best evidence of what warehousing arrangements were permitted, and they are in evidence, I should think that would be sufficient.

I would be glad to hear you further.

Mr. STEFFEN. I will make this one statement, that we are not asking the witness, note carefully, for a 3503 construction of the bulletins, which of course would be within the best evidence rule. We would then have to refer to the bulletins to find out what they said. But where we have charged a conspiracy among several manufacturers, that they have all agreed to fix prices and to have uniform conditions and terms of sale, the understanding of the witness to the effect that special warehousing arrangements might constitute a violation of the bulletins in that it would perhaps work a price reduction, and that therefore his conduct has been changed by that understanding—he has testified that they have no such warehousing arrangements—and I think that his understanding would be not within the best evidence rule and that it would be material.

Justice JACKSON. Well, I am just wondering as to the materiality of his understanding of the rule laid down in the bulletins.

Mr. STEFFEN. The rule may or may not be laid down in the bulletin.

Justice JACKSON. I understood from you that it was.

Mr. STEFFEN. Mr. Bromley stated; I believe —

Justice JACKSON (interposing). You don't contend that it is?

Mr. STEFFEN. I grant that it is the best evidence, if you are going to construe the bulletin. But where we are charging a conspiracy, there I think we are entitled to show the intent and understanding of the 3504 members of the conspiracy, because their conduct, irrespective of what appears in the bulletin, their conduct is really the gist of what we are getting at.

If he understood either that it was in the bulletin or if he understood generally, either in or out of the bulletin, that he might not—and he may have erroneously understood it—I think he is permitted to state.

Justice STEPHENS. We are agreed that the best evidence rule is applicable. The objection is sustained. We do not foreclose the Government from asking the witness what he did or did not do.

Mr. STEFFEN. The witness, I believe, has already testified that he has no warehousing arrangements.

Justice STEPHENS. The ruling probably ought not foreclose the Government from inquiring into the subject, as to what relationship, if any, there was between his conduct and the requirements of the bulletin. I suppose it would be competent for the Government to ask whether or not his having or not having warehousing arrangements was because of any requirement of the bulletins, if he relied upon the bulletins, or anything to that effect. What you asked was his understanding of the meaning of the bulletins, and I think that is barred by the best evidence rule.

3505 Mr. STEFFEN. May I have a moment or two to consult with Mr. Knuff?

Justice STEPHENS. Yes.

(Mr. Steffen consults with Mr. Knuff.)

Justice STEPHENS. We do not foreclose the Government, Mr. Steffen, from inquiring into the reasons for this man's conduct. You can bring out that he would have had a warehouse except for bulletin requirements, or except for the existence of bulletins. But as your question was phrased, it violates the best evidence rule. You asked him the meaning of the bulletins, and of that the bulletins are the best evidence, and they are in evidence. But we are not foreclosing the Government from proving as a part of its case that the action of the defendants was the result of the bulletins.

By Mr. STEFFEN.

Q. Do you know, Mr. Tomkins, of any other warehousing arrangement in the industry similar to that which is described in Government's Exhibit 391?

A. No, sir, I am not aware of any.

Q. And when you say that, do you refer to Ebsary and National and Certain-teed, and the other companies?

A. I have no knowledge of any warehousing arrangement.

Q. (Interposing.) Similar to the arrangement discussed in Exhibit 391?

3506 A. That is right.

Mr. BROMLEY. May I ask, do you mean by that

that you don't know whether or not there is any?

The WITNESS. That is exactly what I mean.

By Mr. STEFFEN.

Q. And if there were any similar arrangement which would have any effect upon obtaining business, as was apparently the effect here, would your salesmen, from your general knowledge of the trade, bring that information to you?

Mr. OLIVER. I object. That question is pure assumption.

Justice STEPHENS. Read the question.

(The question was read by the reporter.)

Justice STEPHENS. That is pretty speculative, Mr. Steffen. I think the objection should be sustained. I think you had better ask him more simply whether or not he would likely have known, in the business, if such arrangements as this existed.

By Mr. STEFFEN.

Q. Answer the Court's question—would you likely have known, through general trade information and your salesmen, of any such warehousing agreement if one had existed?

A. If it had existed in the territory that we covered, it is likely that it would have been reported to us by 3507 a salesman. That is not certain.

Q. It is a fact, isn't it, Mr. Tomkins, that through your salesmen and through your own knowledge of the trade, you keep in very close touch with prices and price conditions, do you not?

A. Yes, sir, we expect to.

Q. And it is a fact that you do, or certainly try to?

A. How close the touch is, I am not able to say. It is as close as we can make it.

Q. I now show you Government's Exhibit No. 398, Mr. Tomkins, which purports to be a letter from Mr. Pellett addressed to the Board Survey Company, under date of October 25, 1933; and I also show you Government's Exhibit No. 399, which purports to be a reply of the Board Survey Company addressed to Kelley Plasterboard Company under date of November 7, 1933.

(The documents referred to were marked Government's Exhibits 398 and 399 for Identification.)

By Mr. STEFFEN.

Q. Have you read Government's Exhibits 398 and 399, Mr. Tomkins?

A. Yes, sir.

Q. Do you recognize Mr. Pellett's signature?

A. I do.

3508 Q. Is he still with the company?

A. No, sir, Mr. Pellett is dead.

Mr. STEFFEN. We now offer Government's Exhibits Nos. 398 and 399.

Mr. BROMLEY. We make only the usual objection.

Justice STEPHENS. Are these offered for the purpose of proving the charge of what has been referred to as "policing" in the complaint?

Mr. STEFFEN. Yes, Your Honor.

Justice STEPHENS. The exhibits are received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The documents marked Government's Exhibits 398 and 399 were received in evidence.)

By Mr. STEFFEN.

Q. I now show you what has been marked as Government's Exhibit 400, which purports to be a copy of a letter from the Newark Plaster Company addressed to the Ebsary Gypsum Company, under date of January 20, 1937, and which bears the initials "FT" in the lower left-hand corner.

(The document referred to was marked as Government's Exhibit No. 400 for Identification.)

By Mr. STEFFEN.

3509 Q. I will ask you if you can identify that as a carbon copy of a letter which you wrote?

A. (No response.)

Justice STEPHENS. Can you answer the question, Mr. Tomkins?

The WITNESS. Yes, sir, I identify that as a copy of a letter written by me to the Ebsary Gypsum Company.

Mr. STEFFEN. We offer Government's Exhibit No. 400.

I might say, Your Honors, that we do not have the reply.

Mr. BROMLEY. This is objected to, may it please the Court, on the ground that it is immaterial and irrelevant, for the reason that there is no charge with respect to which this letter has any possible relevancy. That is to say, the letter appears to involve a resale transaction in plaster, as to which there is no charge in the complaint whatsoever.

Justice STEPHENS. Do you raise any question about the fact that the letter goes to white plaster as distinguished



from neat plaster? White plaster, Mr. Tomkins, is a term you applied, is it not, to the plaster of Paris that you dealt in?

The WITNESS. Yes, Your Honor, that is what it means.  
Mr. STEFFEN. I might develop that further.

Q By Mr. STEFFEN.

Q. White plaster has substantially the same content of stucco, has it not, as neat plaster?

3510 A. The chemical composition is substantially the same.

Q. And your neat plaster is used as your scratch coat or your first and second coats, and the white plaster is used as a finishing coat?

A. That is right.

Mr. BROMLEY. Well, isn't it true that the term "plaster" in the trade is understood to refer to what we call cement plaster and not white plaster?

The WITNESS. Generally, plaster means cement plaster in the trade, because it is used in much greater volume. Ordinarily white plaster is designated as white gauging plaster or plaster of Paris or finishing plaster.

Mr. BROMLEY. Or white goods?

The WITNESS. Or white goods.

Mr. BROMLEY. I don't believe there is any charge in the complaint that covers white plaster.

Justice STEPHENS. Is white plaster used in the building trade, or is it limited to medical uses?

The WITNESS. It is used to a limited extent in the building trade. It is also used for medical purposes, the manufacture of pottery molds, and fine casting work.

By Mr. STEFFEN.

Q. Is there any white plaster used on the ceiling  
3511 of this room?

A. No, sir.

Q. What would you say they did use here?

A. That is either a sand finish or it may have some acoustical plaster in it.

Q. When you put a white coat of plaster over a scratch coat, or the first and second coats, isn't it this type of white plaster which you speak of which is used?

A. It is about one-third white plaster and two-thirds lime.

Justice JACKSON. That is the old hard-wall finish, is it?

The WITNESS. That is right.

By Mr. STEFFEN:

Q. And whenever they make a white finished coat of plaster, they would have to use your white plaster?

A. They wouldn't have to use ours.

Q. I mean that type of plaster.

A. Yes, sir.

Mr. STEFFEN. I think, Your Honor, that white plaster is well within the definition.

Justice STEPHENS. What do you say about the objection raised by Mr. Bromley that there is no charge in the complaint with respect to the fixing of resale prices on plaster?

Mr. STEFFEN. I don't think this has anything to do with resale prices, Your Honor, and we are not  
3512 offering it on that basis at all. We are offering it on the basis of showing that there were arrangements between the different defendants whereby the price to the dealer trade would be established, and of course as a preliminary there have to be negotiations between, for example, Newark and Ebsary. If Ebsary, in this case, was buying from Newark, the price at which Ebsary bought was important in order to determine whether they could sell at the dealer price.

Justice STEPHENS. The objection is overruled. The exhibit is received in evidence subject to the usual reservation with respect to declarations of alleged co-conspirators.

(The document marked as Government's Exhibit No. 400 was received in evidence.)

Mr. STEFFEN. I have perhaps 10 or 15 minutes more with Mr. Tomkins. Would you like to continue or take a recess at this time?

Justice JACKSON. How do you feel about it?

Mr. STEFFEN. I want to conform to the Court's wishes.

Justice STEPHENS. You had better proceed for 15 minutes. We are anxious to make the case move forward just as rapidly as possible, gentlemen.

By Mr. STEFFEN:

Q. Referring to Government's Exhibit No. 400,  
3513 Mr. Tomkins, it says there that the resale price, which I understand to be the dealer price, is being held at a ridiculously low level. What did you mean by that?

A. Well, I presume I meant that —

Q. (Interposing.) We would like to have your best recollection at this time, if you can?

A. (Continuing.) —that the prevailing dealer price for white plaster was unusually low and did not offer an adequate margin of profit to the Newark Plaster Company.

Q. And therefore, in selling Ebsary, you couldn't sell Ebsary at a lower price?

A. That is correct.

Q. Now have you refreshed your recollection concerning plaster prices generally over the period from 1925 up to the present day, before coming here?

A. To the best of my ability. I had some notes made on prices during that period.

Q. I would like to have you refer particularly to the period between 1925 and 1929. What was the trend of prices, during that period, of plaster?

A. I have no information on 1925 —

Mr. BROMLEY (interposing). Just a moment. I make the same objection, if these prices apply only to white plaster.

By Mr. STEFFEN.

3514 Q. Are your prices relative to white plaster or plaster generally?

A. White plaster only. They are the only prices we have any information on.

Q. White plaster was what your company was making and selling at that time?

A. That is true.

Mr. BROMLEY. I object to this as immaterial.

Justice STEPHENS. Did you sell your white plaster at the same prices stipulated in the bulletins?

The WITNESS. No, sir, there were no bulletins on plaster prices.

Justice STEPHENS. That puts a different light on this question. The reason we overruled Mr. Bromley's objection to the white plaster evidence was because we thought you brought out from the evidence that white plaster was used in the trade, at least to some extent, in walls and wall plaster work, but we assumed that you were contending this was within the bulletins. What is your position, Mr. Steffen?

Mr. STEFFEN. No, I had gone on from the bulletins. What I am contending is that it comes squarely within the complaint. Paragraph 45 (c) says that we have charged the defendants in this case with: "concertedly raising,

maintaining, and stabilizing the general level of prices for plaster and miscellaneous gypsum products  
3515 manufactured and sold by said companies in the Eastern area."

Here is a situation where we have white plaster which is used in the building trade, and I wanted to get from Mr. Tomkins just a statement as to the prices which the plaster had been sold at during the period prior to 1929 and following 1929.

Justice STEPHENS. In other words, you contend that the complaint is so broadly phrased in paragraph 45 that it includes price fixing arrangements outside the bulletins?

Mr. STEFFEN. Oh, yes, Your Honor. In fact, our whole charge is that they have used the bulletins and the license agreements simply as a subterfuge whereby to fix the prices not only of board under the agreement, but of board and plaster generally.

Justice JACKSON. Wasn't there a reference to that in the Bill of Particulars, as to what the "miscellaneous products" were?

Mr. STEFFEN. That had to do with miscellaneous products. I regard white plaster as plaster. There are several different types of plaster.

3516 Justice STEPHENS. In view of the broad construction put upon the complaint by the majority of the Court, we think the objection should be overruled, unless there is some further contention by you, Mr. Adams—what is your contention?

Mr. ADAMS. I would like to suggest that this is not the proper way of proving prices under any circumstances, and object on that ground.

Justice STEPHENS. It depends on what the witness is doing. If he is reading items which he has copied from some statistical book or record, you are correct, but if he has simply made up an itemization himself from his own recollection, and is using these notes to refresh his recollection, I don't see the objection to that.

By Mr. STEFFEN.

Q. Was your memorandum there made up from your office records, Mr. Tomkins?

A. It was made up by someone in my office from any sources that they could find that threw any light on what prices had been in this past period.

Q. And those sources would be your office records?

A. Yes, they might be correspondence —



Justice STEPHENS (interposing). Are you using those notes to refresh your recollection so that you now have a recollection of your own, or are you simply reading the notes to us as a reflection of your office records?

3517 The WITNESS. A reflection of my office records. I have no recollection of any prices in those years.

Mr. ADAMS. It appears, your Honor, that he did not prepare the data himself. It also appears that it comes from a lot of different sources.

Justice STEPHENS. Well, you needn't go further, Mr. Adams. We will hear you further, Mr. Steffen, if you wish, but it would seem clear that the witness cannot testify except from his own recollection as refreshed by these notes.

By Mr. STEFFEN.

Q. I want to get at, generally, the prices in 1926, 1927, 1928 and 1929. Would you be able to say that the prices were chaotic and that there was a price war in plaster during that period?

Mr. ADAMS. I object on the ground that that calls for a conclusion. It seems to me that the word "chaotic" is pretty much of a conclusion.

Mr. STEFFEN. This is on cross-examination and he can answer "yes" or "no".

Justice STEPHENS. Read the question, please.

(Thereupon, the pending question was read by the reporter.)

Justice GARRETT. I don't know what he means by "chaotic". I know the dictionary definition of "chaotic" but I don't know the meaning as applied here.

3518 Mr. STEFFEN. I will be glad to bring that out, your Honor.

Justice STEPHENS. The objection is overruled, Mr. Adams. It seems to the Court that subject to clearing up the use of the word "chaotic" for Judge Garrett, as applied to this situation, that an experienced businessman in this business can testify of his own knowledge as to the nature of price conditions, and use such terms as "price war" and "chaotic", if explained correctly. Though it does involve an inference, it is the kind of an inference that can be properly drawn by this witness. The objection is overruled.

The WITNESS. I have no recollection as to plaster prices generally. I had no interest in any plaster other than white plaster; during that period from 1926 through 1929

I would not say that white plaster prices were chaotic.

By Mr. STEFFEN.

Q. Were they stable during that period?

A. During that period they had about the same degree of stability that they have had for the entire period 1926 through 1940.

Q. Could you say whether prices of white plaster were falling from 1927 to 1929?

A. No, sir, I couldn't say.

Q. Well, were they increasing?

A. I can only answer by referring to these notes which I understand I am not permitted to use. I have no recollection from year to year in 1926 or 1927 as 3519 to what the white plaster prices were.

Q. But could you not give the trend as to whether it was up or down?

A. No, sir, white plaster prices have changed from year to year. I cannot separate two years, back in 1926 and 1927, and recall whether the price in 1927 was higher or lower than in 1926.

Q. Well, are you unable to testify as to the trend one way or the other in those three or four years?

A. Completely unable to testify.

Q. Has there been any change or trend since 1929 that you could testify concerning?

A. No, sir, no trend. I can't testify to any trend in white plaster prices during the entire period.

Q. What does white plaster sell at now? I notice in one of the invoices here that it was selling at \$10 a ton.

A. I don't recall any price as low as \$10 a ton for white plaster.

Mr. BROMLEY. The reference you just made was to neat plaster, and not white plaster.

By Mr. STEFFEN.

Q. What was the going price for white plaster in, let us say, 1940, 1941 and 1942?

A. Today white plaster is selling at our mill at \$14.70 per net ton.

3520 Q. Has that been a fairly stable price over the last three or four years?

A. To the best of my recollection it has. There has been very little white plaster business for the last three or four years.

Q. In 1940, and for the years prior to that, can you

recollect whether it then also sold at \$14.70 per ton f. o. b. your mill?

A. The price varied a dollar or two. Some years it would sell for \$15.70 or \$16.50.

Q. And was it ever below \$14.70 during the years preceding 1940?

A. Any year preceding 1940?

Q. That you can recollect—had the price gone below \$14.70?

A. Oh, yes. The lowest price I have any present recollection of is \$11 a ton.

Q. What other companies sell white plaster in your market?

A. Of their own manufacture?

Q. Let's stay with that, first, yes.

A. United States Gypsum Company, the National Gypsum Company, Certain-teed Products Corporation; Connecticut Adamant Plaster Company—those are all I can recall.

3521 Q. And are you the largest producer in that market?

A. No, sir.

Q. Who would be, or who is, rather?

A. Well, I have no knowledge as to that, but I believe the United States Gypsum Company is.

Q. And would you say that National sold more white plaster than you? What I am trying to get at is that I want to find your relative position in the industry.

A. I don't know whether National sold more white plaster than we did. I would doubt it. But I have no figures to base my statement on.

Q. When you say in your letters that the prices had been established, you didn't mean that there was any agreement, did you, among the producers to establish the price on white plaster?

A. No, sir, I meant that was the market price for white plaster.

Q. And the market price would be fixed by the dominant selling interests, such as United States Gypsum?

A. Not necessarily.

Q. They would have a very important influence in setting the market price, would they not?

A. Any manufacturer would. The lowest price set by any manufacturer would very quickly become the market price.

Q. And did you feel perfectly free, or have you

3522 felt perfectly free up until, let us say 1937, to change the white plaster price, your white plaster price?

A. Yes, sir.

Q. Any way you saw fit?

A. Yes, sir, any way we wanted to.

Mr. BROMLEY. Did you mean to stop at 1937?

Mr. STEFFEN. No, I was just taking 1937 as a date. From 1937 on to the present time, I would like to take up in a separate question.

By Mr. STEFFEN.

Q. In 1937, the Kelley Plasterboard Company, or your company, rather, took over the Kelley Plasterboard Company, and in 1939, your company merged with the Kelley Plasterboard Company and took an assignment of the license agreement with USG—I think you have testified to that.

A. By “your company” you mean Newark Plaster Company?

Q. Yes.

A. That is correct.

Q. And when I say “your company” I also refer to the Calvin Tomkins Company. I think we have been treating the two as one company?

A. I don't regard them as one company.

Q. I know you don't regard them as one company, but the Court, I think, and the Government now is obligated to regard them as one company.

3523 Justice STEPHENS. Nevertheless, for the purpose of clarity in the examination, whatever the conclusion is with respect to the identity of the companies, perhaps if you mean Calvin Tomkins Company you had better refer to it, because the witness apparently does differentiate in his own mind.

Mr. STEFFEN. Very well.

By Mr. STEFFEN.

Q. To make the record clear, Calvin Tomkins has observed bulletin prices throughout the period 1939 to date, has it not?

A. It has.

Mr. BROMLEY. On what, if the Court pleases?

Mr. STEFFEN. On board and all products coming within the bulletin provisions.

Mr. BROMLEY. That is only board, Mr. Steffen. There



isn't any bulletin price on anything except patented gypsum board manufactured by the licensees.

Mr. STEFFEN. I simply want the record to show that Calvin Tomkins Company has been abiding by bulletin prices on products which come within the terms —

Justice STEPHENS (interposing). Is that in dispute?

Mr. BROMLEY. No.

Justice STEPHENS. That may be admitted, I should think.

Mr. BROMLEY. I don't know what he means by "abiding", but I assume he means selling at —

Justice STEPHENS (interposing). Bulletin prices.

3524 Mr. BROMLEY. Yes.

Justice STEPHENS. You had better reform that question and bring that out.

By Mr. STEFFEN.

Q. It is the fact, is it not, Mr. Tomkins, that the Calvin Tomkins Company in selling board and lath has been conforming to bulletin prices and the terms and conditions of sale of the bulletins in selling such board and lath?

A. During the period that the Kelley plant was being rebuilt, the Calvin Tomkins Company sold board purchased from other companies at bulletin prices. It was not required to observe bulletin prices. During the balance of the period, the Calvin Tomkins Company sold board manufactured by Newark Plaster Company at bulletin prices.

Q. And during that period when your mill was burned down, you had the bulletins, did you, and the Calvin Tomkins Company got the bulletins?

A. We received the bulletins during that period, yes.

Mr. OLIVER. When you say "we" do you mean to include Calvin Tomkins?

The WITNESS. I mean Calvin Tomkins.

By Mr. STEFFEN.

Q. I want now to show you, Mr. Tomkins, Government's Exhibit No. 37, at page 531. After reading that, Mr. Tomkins, would you say that you would be privileged to price-cut on plaster if you were selling board and  
3525 plaster together?

Mr. BROMLEY. I object —

Justice STEPHENS (interposing). I don't understand the question. Please read it.

(Thereupon, the pending question was read by the reporter.)

Justice STEPHENS. Just a moment, let us read this exhibit.

Mr. STEFFEN. I want to refer your Honors particularly to the last paragraph on that page.

Justice STEPHENS. What is the nature of your objection, Mr. Bromley?

Mr. BROMLEY. It is incompetent because it asks for an interpretation of or a conclusion as to a written document, the provisions of the bulletin.

Mr. STEFFEN. I think, your Honor, that we now have a defendant on the stand, and we have certainly met the best evidence rule by showing the witness the particular bulletin, and we now want a construction as to what he understands by that bulletin. It is fairly clear what it provides, but it is important to know whether the defendant understood it that way.

Justice GARRETT. Isn't that, Mr. Steffen, a matter for the Court to determine? What he did under that contract—isn't that the question—not whether he thought he was at liberty to do something.

3526 Mr. STEFFEN. I think maybe your Honor is quite right. I will be very glad to rephrase my question.

Justice STEPHENS. I think we are not confronted merely with the best evidence rule, but we are also confronted, under the objection, with the proposition that the Court must determine, not the witness, what these bulletins mean, and what they required of parties to whom they were sent, and who were bound or purported to be bound by them.

For the guidance of counsel the Court will reiterate that it seems to the Court that Rule 43 (b) doesn't permit cross-examination of an adverse witness in the usual sense of the term that he is being cross-examined as if he had already testified upon direct examination, and is therefore to be examined with respect to his understanding of items referred to on direct examination.

What the rule says is not that he should be cross-examined, but that he may be asked leading questions. You may ask, and we do not at all assume to foreclose the Government from bringing out, what this witness did in view of the bulletins, or what he might have done except for the bulletins, but I think the point raised by Judge Garrett is correct. The objection is sustained.

Mr. STEFFEN. I would like to make a brief statement on that to this effect, that these bulletins are by no means self-explanatory and we would like to get a construction of them from the people who are actually operating under

3527 them from time to time. I think that in this present instance I can ask the witness a question which will bring out what I want to develop.

By Mr. STEFFEN.

Q. As a matter of fact, Mr. Tomkins, your company has never cut the price of plaster for purposes of facilitating the sale of board, has it?

A. No, sir.

Q. Referring now to Government's Exhibits 398 and 399, which are the letter signed by Mr. Pellett, and the reply from the Board Survey Company, respectively, those were charges there that the Ebsary Gypsum Company was shaving or cutting the price of plaster in order to sell more board —

Mr. O'DONNELL (interposing). I object to that, the exhibits speak for themselves.

Mr. STEFFEN (continuing). Were they not, Mr. Tomkins?

Justice STEPHENS. Just a moment, let us look at the exhibits.

Well, it may be in a highly technical sense that your objection is well taken. As to what the letter means, the letter must itself show. But if the witness knows, as this is a letter from the company which he took over, what the nature of the complaint was, it would seem not seriously objectionable and perhaps helpful.

Mr. O'DONNELL. May I add, your Honor, that this letter is dated about five years prior to the time  
3528 Mr. Tomkins had any connection with the company.

Justice STEPHENS. Did you have anything to do with writing this letter?

The WITNESS. No, it was long before we had any connection with the Kelley Plasterboard Company.

Justice STEPHENS. Then we think that the objection should be sustained.

By Mr. STEFFEN.

Q. Now I have just two or three questions, Mr. Tomkins, which are necessary to clear up the record. You testified, I think, that you buy gypsum rock from the United States Gypsum Company, or were doing so up until recently.

A. Well, we have bought gypsum rock from the United States Gypsum Company and also from the National Gypsum Company.

Q. And you obtain the rest of your supply, or some additional part of your supply, from the American Cyanamid Company?

A. That is where we are presently obtaining it, yes, sir.

Q. Can you give us the difference in cost between the American Cyanamid product and the rock product?

Mr. BROMLEY: I object to that as immaterial.

Justice STEPHENS. What is the —

Mr. STEFFEN (interposing). I think it is informative, your Honor, in order to get before the Court the general situation. There will be just one or two questions.

Justice STEPHENS. It may well be informative, but since counsel objects on the ground that it is immaterial and not related to the charge, let me hear you briefly as to why you wish to show it.

Mr. STEFFEN. I think that the American Cyanamid Company, which has been making synthetic gypsum, has been a rather disturbing element in the board and plaster prices for the reason that it sold at a very low price and the gypsum rock, on the other hand, sold at a very high price. I should like to develop that.

Justice STEPHENS. Well, it may have some bearing upon the general charge. The objection is overruled.

By Mr. STEFFEN.

Q. I want the price at which you buy synthetic, and the price at which you have been buying gypsum rock.

A. The gypsum rock we purchased from the United States Gypsum Company we purchased for about \$2.25 a ton. The synthetic material we are purchasing from the Structural Gypsum Division of the American Cyanamid Company, and that is purchased for about \$5.50 a ton.

Mr. OLIVER. May I inquire if those prices are as of today, or when?

The WITNESS. The price from American Cyanamid, or the Structural Gypsum Division of American Cyanamid, is as of today. The price from the United States Gypsum Company is as of about 1940, or 1941.

By Mr. STEFFEN.

Q. Now are those comparative prices, Mr. Tomkins? One is of rock and the other is of stucco, is it not?

A. That is correct.

Q. And they are not comparative, are they?

A. No, sir.



Q. Could you give us comparative prices?

A. Well, I don't know how I can compare crude gypsum rock with plaster manufactured from a synthetic material.

Q. No, I understand that, and I would therefore like to get, if I could, a comparison of the two stucco prices.

A. By the time the gypsum rock is freighted to our plant, unloaded and made into calcined plaster, it should cost approximately the same as the price we are now paying the Structural Gypsum Division.

Q. Is that price you are now paying Structural the same price that you paid back through the preceding five or six years?

A. We have only been purchasing it for about two or two and a half years.

Q. Are you familiar with the price that Kelley paid during the time when you were taking over Kelley?

A. No, I am not.

3531 Q. You were there from 1937 to 1939?

A. Correct.

Q. And do you know what price they were paying?

A. Kelley was not buying it then, and we did not purchase material from Structural.

Q. I see. One other question which has to do with paper. Where do you procure your paper for making the board?

Mr. BROMLEY. I object to that as immaterial.

Mr. STEFFEN. I simply would like to round this out and show what goes into making board. I think it is very material.

Justice STEPHENS. Overruled.

The WITNESS. We are purchasing paper from the Federal Paper Company, in New Jersey; the Ohio Box Board Company and the Schmidt & Ault Company in Pennsylvania.

By Mr. STEFFEN.

Q. Can you give us an estimate of the cost of the paper that goes into a thousand square feet of gypsum board?

Mr. BROMLEY. The same objection.

The WITNESS. No, sir, I can't —

Justice STEPHENS (interposing). Just a moment. You don't know?

The WITNESS. I don't know.

By Mr. STEFFEN.

Q. Can you tell us whether it is greater or less than the cost of the gypsum that goes into the board?

3532 A. No, sir, I would have to look up the figures.  
I don't know the number of pounds of paper used per thousand feet of board.

Q. It is true that it is around 150 to 175 pounds, is it not?

A. I don't know.

Q. Is it a substantial item in the manufacture of board?

A. It certainly is.

Mr. STEFFEN. I think that concludes the direct examination, your Honor.

Justice STEPHENS. We will recess for five minutes.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. You may proceed, Mr. Bromley.

#### CROSS-EXAMINATION by Mr. BROMLEY.

Q. May it please the Court—Mr. Tomkins, you just told us a moment ago, in answer to a question, that you never cut the price of plaster for the purpose of inducing the sale of board. Isn't it a fact that at all times, both before —

Mr. STEFFEN (interposing). Your Honor, I think I should make an objection now. I regret to interrupt Mr. Bromley's examination, but he has started to ask a leading question. Mr. Tomkins is a defendant, and as I understand the rule, the Government may ask leading questions as if upon cross-examination, but it does not follow  
3533 that everybody else may.

When this matter was up before the criminal court, Judge Goldsborough instructed the defense counsel not to lead the witness.

Justice STEPHENS. Rule 43 (b) says:

"A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject-matter of his examination in chief."

Mr. STEFFEN. I call your Honor's attention to the fact that when speaking of the right of the Government, in this case, to interrogate him by leading questions, that that is explicitly stated. When it comes to the cross-examination

they very carefully leave out the matter of leading questions and simply say that the witness may be contradicted or impeached, and the omission of the right to direct leading questions, when the other party is examining his own witness, or the defendant in this case, is to my mind a full statement of the rule.

3534 That is, that we may call Mr. Tomkins as if upon cross-examination, and we may direct leading questions to him, and we may impeach him. The defendants, when they cross-examine are privileged to impeach him, but not to direct leading questions to him.

Justice STEPHENS. The Court will hear counsel on both sides on this matter if it is necessary. You present a conception of the rule, Mr. Steffen, that is, frankly, quite foreign to my understanding of it. This witness is called by the Government, he is a Government witness. It is true he is the officer of a defendant company and therefore these rules provide, as was not the case under the old rules, that leading questions may be asked of him, notwithstanding that he is your own witness.

But as I understand your contention at the present time, the opposite party is forbidden to cross-examine a witness called by you, is that right?

Mr. STEFFEN. He is definitely privileged to cross-examine within the scope of the direct examination.

Justice STEPHENS. There is no question about that.

Mr. STEFFEN. That is all that the rule states, as I understand it. He is forbidden to ask leading questions of a defendant. The rule concerning leading questions, as I understand it, is very clearly that where the witness is  
3535 friendly, leading questions should be forbidden. I mean that is the basis, the principle, upon which the whole thing rests.

Justice STEPHENS. The basis of the rule is that with a defendant, leading questions should be permitted by the party who has to call an officially hostile witness.

Mr. STEFFEN. The basis, may I state more fully, because this is apparently important.

Justice STEPHENS. Yes.

Mr. STEFFEN. The basis of the rule, as I understand it, concerning leading questions, is that if a counsel puts into the mouth of a friendly witness an answer, that we don't produce the truth before the court, and the court is interested in getting trustworthy testimony.

We called Mr. Tomkins out of turn, as if upon cross-examination. We have to go to the defendants for some

of our facts. If we had waited for Mr. Bromley to call Mr. Tomkins, we then could have put most of the questions to him, and we would have then done it by way of cross-examination and could have directed leading questions to him.

But in this case we have called him out of turn, we have used the same type of examination that we could have used had Mr. Bromley called him in his part of the case, and we now ask simply that the defendants and defendants' counsel use exactly the same form of examination that they would have, had they put him on as part of their case.

3536 It seems to me that that is a pretty well recognized matter. It certainly was recognized when Mr. Tomkins was on the stand in the criminal case. Judge Goldsborough there stated to defense counsel that after all Mr. Tomkins was a defendant, and he was friendly, and it was not permitted for defense counsel to put words into his mouth by leading questions and augment the record in that way.

I think I have a very good technical argument on 43 (b), because you will note that when we call a witness for cross-examination we are entitled to interrogate a witness by leading questions, and to contradict and impeach him in all respects as if he had been called by the adverse party. Then when it comes to the cross-examination it says that he "may be cross-examined by the adverse party only upon the subject-matter of his examination in chief." And it says that the witness thus called may be contradicted and impeached by the adverse party.

But it does not say, and they carefully omit saying it, that he may be interrogated by leading questions.

Justice STEPHENS. Are you through?

Mr. STEFFEN. Yes, your Honor.

Justice STEPHENS. As you have stated the matter—I want to be quite frank with counsel as to my understanding of this rule to which I have given some attention—it presents an entirely new view with respect to the rule, that I know of no authority for. The old rules were that

3537 the matter was wholly within the discretion of the judge, that a witness had to be shown to be actually hostile before he could be cross-examined by the party calling him. Now that, as I understand the point of view of the rule makers, was perhaps a hardship upon parties who had to call for their own witnesses members of the adverse side of a case, and it was thought, therefore, that it was desirable to give an absolute right to ask leading ques-



tions of a witness who was an adverse party, or the officer of an adverse party, even though he was not actually hostile, or shown to be actually hostile.

But I have never understood that rule to go so far as to deny to the opponent in his examination of that witness, the right to cross-examine him, including the right to ask him leading questions.

If you have any authorities on this, if you are going to insist upon it throughout the balance of this case, we will hear you. What do you say, Mr. Bromley?

Mr. BROMLEY. I say first that the precedent established by Judge Goldsborough hasn't any persuasive value whatsoever here because these rules did not apply in that case, that being a criminal case.

I take it there is no purpose in discussing whether Judge Goldsborough was right or not. He seemed to think that Mr. Tomkins was my client, and so stated when he made his ruling.

3538 After I straightened him out, and told him that he was not my client, he relaxed the rule, it seemed to me, and let me conduct the examination in the usual way. However, I don't think that that has any bearing here by way of precedent whatsoever.

It seems to me that the rule is too clear to permit a discussion of whether, in this situation, I can cross-examine this witness.

I would like to know what Mr. Steffen thinks constitutes cross-examination if you take out of it the element of being permitted to lead a witness. I say the rule on its face is perfectly clear that when it says that you can contradict, impeach and cross-examine, it means that you can cross-examine in the ordinary way, which is by leading the witness.

Mr. STEFFEN. I think "cross-examination" was apparently the only word they could use there to indicate that after I had finished with the examination, as if upon cross-examination, then the next counsel would have to do something, and they called it "cross-examination". It seems to me that the Court should not lose sight of the basis of the rule concerning leading questions —

Justice JACKSON (interposing). How in the world can you cross-examine except by asking leading questions?

Mr. STEFFEN. By asking non-leading questions.

Justice JACKSON. I never heard of such a thing. That is the great underlying principle of cross-examination, the asking of leading questions. And what

do you consider the examination in chief of this witness, your examination, isn't it?

Mr. STEFFEN. No.

Justice JACKSON. Then whose is it?

Mr. STEFFEN. We are now listening to Mr. Bromley as if it were examination in chief.

Justice JACKSON. This isn't examination in chief now. How could it possibly be?

Mr. STEFFEN. Will your Honor let me make this clear?

In the first place, we should not have to call him at all, according to the old rules. But under the new rules, we are permitted to call a defendant in anticipation; and we, in this type of case, practically have to develop all of our evidence from defendants, or people related to the industry.

Under the present rules we can call a defendant, and we are entitled as of right, to question him as if upon cross-examination. Now that doesn't mean that he is, in the full sense, our witness. He is still a defendant and the reason why we may direct leading questions to him is whether he is actually hostile or not, he is a technically hostile witness. So that we may ask him leading questions to develop the truth of the matter.

Now the basis for denying a party from asking leading questions is that he will, by asking leading questions, put the answers into the mouth of the witness.

3540 Now I think that Mr. Tomkins is the most honest witness that we have had here throughout, and I doubt if he will be led. But the principle of the thing is very important, and if Mr. Bromley or the defense throughout the rest of the trial are to be permitted to put the answers into the mouths of their own defendants, it is going to greatly prejudice the Government in the case, and it seems to me that it violates the whole basis of the notion of leading questions.

Leading questions are permitted only where it would not be possible otherwise to get a fair presentation of the facts.

Justice STEPHENS. The Court does not lose sight, Mr. Steffen, of the purpose —

Mr. STEFFEN (interposing). I didn't mean to suggest that you had.

Justice STEPHENS (continuing). —of the purpose of permitting leading questions. The reason that leading questions are permitted of an adverse witness, if he is actually hostile, is that it aids in getting the truth out of him, but

it seems to me that it would be the clearest sort of error, of a reversible character, to deny the defendants in this case—or, if the situation were reversed, to deny the Government, if it could be reversed; of course it can't, because the Government isn't a corporation or a party who has officers in the usual sense—but it seems to me that it would be the clearest sort of error to deny any party the  
 3541 right to cross-examine, including the asking of leading questions, a witness who has been called by the opposite side.

You have called this witness to prove a part of your case. You could have called him under the old rules. You might not have done so because you might have thought him hostile, but you have called him, you have put him on to prove a part of your case.

We are, all three of us, fully agreed, Mr. Steffen—I am sorry—that your position is not well taken, and your objection is overruled.

Mr. STEFFEN. May we be privileged to submit any authorities that we have on this?

Justice STEPHENS. Well, it seems so elementary to us, Mr. Steffen—if you have authorities, if you know of authorities on the subject, of course we will receive them, but we ought to receive them now because we cannot go back and undo all of this, and it seems to us that where you ask so radical a change from the accepted procedure of courts, that you ought to have the authorities here now, if you have any authorities on the subject. Do you have any?

Mr. STEFFEN. I have none at the moment, your Honor.

Justice STEPHENS. Do you know of any?

Mr. STEFFEN. I have thought that Mr. Wigmore in his discussion of the matter would take the position that we are taking, but I do not have the reference right  
 3542 here.

Justice STEPHENS. I think we had better make our ruling now. The objection is overruled.

Mr. BROMLEY. I will withdraw the question, and may the record show, if it please the Court, that I am cross-examining this witness and have no purpose or intent to make him the witness of my client or of any defendant.

Justice STEPHENS. The Court might add that it seems in a way, at least so far as this witness is concerned, that the matter is a tempest in a teapot. This witness is obviously an honest witness and obviously a witness who discriminates carefully as to his answers. It seems to me very

unlikely that any words can be put in his mouth by either side.

Mr. STEFFEN. From the Government's side I want to agree with that, that we believe he is most honest.

Mr. BROMLEY. I will reserve my opinion until the close of the cross-examination: (Laughter.)

By Mr. BROMLEY.

Q. As I understood you, Mr. Tomkins, you said a few moments ago that you never cut the price of plaster for the purpose of inducing the sale of board. I ask you now whether it isn't the fact that at all times right down to date, you have felt perfectly free to charge any price for plaster you wanted to.

A. Yes, sir.

3543 Q. And isn't it the fact that the only effect that the bulletins had upon your understanding was that you knew you should not make a fake or false price for plaster in order to directly give a rebate to a board purchaser?

A. That is correct; yes, sir.

Justice STEPHENS. Read back the question and answer, please.

(Thereupon, the last question and answer were read by the reporter.)

By Mr. BROMLEY.

Q. By way of illustration, Mr. Tomkins, if the board price under the bulletins were \$13, and the going market price for plaster were \$10, it would be possible, would it not, to accomplish a rebate on the board price by selling board at \$13, but saying to the purchaser of the board, "Now if you want plaster, I will give it to you for \$2" 'way below any reasonable price or going market price?

A. Yes, sir, it would have been entirely possible.

Q. And if that were done that would merely be a way of giving a rebate on the \$13 price on board, wouldn't it?

A. Yes, sir.

Q. And did you know from your experience in the business, that sometimes manufacturers did just that sort of thing with the intent and for the purpose of cutting the bulletin price on board?

3544 A. I know of no specific cases. I suspect it was done on occasion.

Q. You also said this morning that you received licensor price bulletins during the period that the Kelley factory was closed due to the fire. Do you recall that?



A. Yes, sir.

Q. Well now, isn't it the fact, sir, that right after the fire, which was in March, 1940, I believe you told us, you no longer received the price bulletins from USG, and therefore had to write for them?

A. On one occasion we apparently had not received a change in bulletin prices, and we did write to the United States Gypsum Company requesting that the bulletin be furnished us.

Q. And the fact is that the United States Gypsum Company refused to send you the bulletins, isn't that so?

A. At first it did, yes, sir.

Q. And then they were induced to send you the bulletins only because of some explanation that you made to them, do you recall that?

A. I do.

Q. And do you remember what that explanation  
3545 was?

A. I have recently seen the letter that set it forth, yes, sir.

Q. And what was the explanation?

A. That the Kelley Company, after its fire, had a quantity of board left on its hands, of its own manufacture prior to the fire, and that it was as to the sale of that board that bulletin prices were requested so that the license agreement would not be violated by the sale of board manufactured by Kelley under the patents at prices other than bulletin prices.

Q. You have said Kelley two or three times. You meant Newark, didn't you?

A. Manufactured by Newark, yes. This was 1940.

Q. So wherever you said "Kelley" in the prior answer, you meant to say "Newark"?

A. That is correct.

Q. So that the fact was that during the period your factory was closed because of the fire, and you weren't making board, you nevertheless had in your warehouse board which had been made by Newark under the patents?

A. That is true, yes, sir.

Q. And it is likewise true that during that period you were selling not only the board which had been manufactured by Newark, but also board which you had purchased from others?

3546 A. Yes, sir.

Q. And so far as the board which you had manufactured was concerned, you were obligated to follow the

USG bulletin prices, weren't you?

A. Yes, sir.

Q. But you have told us, and it is the fact, isn't it, that you knew you had no such obligation with respect to the board that you purchased?

A. No, we knew there was no such obligation as to that board.

Q. And the reason, then, that USG resumed sending you the bulletins was because you informed them that you had board which had been made by you and which was lawfully subject to price control even during this period; isn't that right?

A. Yes.

Mr. STEFFEN. I don't believe the witness can answer what the reason was. It seems to me that it is simply out of his domain.

Justice STEPHENS. Answer what? I didn't hear you.

Mr. STEFFEN. Give the reason that Mr. Bromley is asking him about, which is USG's reasoning.

Justice STEPHENS. Read the question and the answer.

(The question and answer were read by the reporter.)

3547 Mr. STEFFEN. I move that the answer be stricken on the ground that he is not qualified to state what reason USG may have had for sending the bulletins.

Justice STEPHENS. That depends upon whether he knows. If he doesn't know, of course, he can't testify to it, and then your objection is well taken.

Answer this question yes or no: Do you know why USG did send you the bulletins?

The WITNESS. Yes, sir.

Justice STEPHENS. Then he may answer.

Mr. STEFFEN. I would like to ask him how he knows.

The WITNESS. Because they told us.

Mr. STEFFEN. Who told you, Mr. Tomkins?

The WITNESS. The United States Gypsum Company.

Mr. STEFFEN. What person?

The WITNESS. By letter, I believe it was signed by Mr. Sadler.

Mr. STEFFEN. And he stated the reason why they could not furnish you with bulletins?

The WITNESS. The reason why they could, that is my best recollection.

Mr. STEFFEN. I think that is hearsay, Your Honor. I don't see how Mr. Tomkins can give an answer as to the reasons. He is surmising from a letter, which is not in

evidence, that the reasons may be what appear in that letter.

3458 Justice STEPHENS. Well, the objection seems a little extreme, but if counsel insists upon it, it is well taken and the objection is sustained.

By Mr. BROMLEY.

Q. What was your reason, Mr. Tomkins, for wanting the price bulletins during the period that your plant was closed?

A. We were still selling board during that entire period. We had to know what the prices were as to the inventory of board of our own manufacture, so that we would not violate our license agreement. As to board that we purchased, we were interested in knowing what the dealer prices were, because it was important to us to get the highest price that we could, as we had a small margin to work on, and we knew we could not get a price higher than other manufacturers were selling at, which meant that the bulletin price was the high price.

Q. At all times you realized that you had no legal obligation to sell the board that you purchased from others, at the bulletin prices?

A. That was perfectly clear to us.

Q. And you had no agreement with anyone that you would sell that board that you purchased at any price whatsoever, did you?

A. No, sir, we did not.

Q. Now if you sold the purchased board at the same price that you sold the board of your own manufacture during this period, isn't it the fact that  
3549 you did so by reason of your determination that that was a matter of good business policy?

A. Yes, sir. We couldn't sell, at different prices, the same commodity to the same trade. It would have been impossible.

Q. It was a matter of good business, then, was it not, to sell both classes of board at the same price?

A. That was our opinion, yes.

Q. And you did that entirely voluntarily, and not pursuant to any arrangement or agreement with anyone, didn't you?

A. As to the purchased board, that is true, yes, sir.

Q. By the way, this purchased board you bought at the dealer's price less a small discount, didn't you?

A. We purchased it at the dealer's price less 12½ per

cent on lath and 15 per cent on wallboard.

Q. So that even if you had wanted to make a difference in price as to the purchased board, your margin of profit was very small anyway, wasn't it?

A. We thought it was.

Q. Now you expected, during all of this period, to be back in production with a new plant within a short period of time, didn't you?

3550 A. Yes, sir.

Q. And of course, once you got back into production with a new plant, then the prices of all board that you manufactured, and therefore all the board that you sold, would have been again subject to USG's determination in the bulletins, wouldn't they?

A. They would.

Q. And was that another reason why, during this short period that you were building the new factory, you didn't want to make any differentiation as between the price of purchased board and manufactured board?

A. Well, during this period we wanted to maintain our position as manufacturers of board as nearly as we could. We didn't want to destroy the price structure that we would expect to work under when we were again in operation.

Mr. BROMLEY. Will you hand the witness Exhibit 400, please?

(Exhibit No. 400 handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at that exhibit, Mr. Tomkins, please?

A. Which exhibit?

Q. Exhibit 400, the letter of January 20, 1937, from yourself to George Lenci.

A. Yes, I have it.

Q. You were talking about the price that you were going to charge the Ebsary Company for white  
3551 plaster which it might buy from the Newark Company, were you not?

A. Yes, sir.

Q. And in the first sentence, the reference to the resale price means the price which dealers were paying in the market for white plaster, doesn't it?

A. That is correct. That word "resale" refers to the resale that the Ebsary Company would make to a dealer.

Q. And the resale was to a dealer, wasn't it?

A. Yes, sir.



Q. So it is the fact, then, that you thought at that time that the dealer price for white plaster was low?

A. Extremely low, yes.

Q. And it is the fact further, isn't it, that you thought it was so low that you could not sell white plaster to Ebsary at very much below the dealer price?

A. Yes, that is right, we could not put him in a position to make a profit on a resale because the resale price, the dealer price, was too low to permit it.

Q. And you were telling him, weren't you, that if you made him any sale at all, you would have to sell him at a price so near the dealer's price, that is, the price that he could get on the resale, that there wouldn't be any profit in it for him?

A. That is it, it would not be profitable to him.

3552 Q. Now did you mean to intimate in that letter, in your use of the word "held" in the first sentence, that there was any arrangement or agreement among any class of the white plaster trade with respect to any price on white plaster, whether original sale or resale?

A. No, sir. By "held" I simply meant that so long as any manufacturer of white plaster was willing to sell it at this low price, it would be impossible to sell at a higher price. The sale by one manufacturer at a low price would tend to hold the white plaster price in that market at that level.

Q. When you said, in the last sentence, "We are hoping that something will be done in the near future to increase the resale price", did you mean by that to refer to any agreement or arrangement among anybody whereby the resale price would be increased pursuant to concerted action?

A. No, sir, there never were any agreements as to the resale price of white plaster, that I knew of.

Q. And what did you mean when you said you were hoping that something would be done to increase the price?

A. I was hoping that other manufacturers would find it as unprofitable as we were finding it, and raise their prices.

Q. So that neither at this time, the time of the writing of this letter, Exhibit 400, nor at any other time, were you or your company a party to any arrangement  
3553 or agreement of any kind with anybody, as to what the price of white plaster would or would not be?

A. No, sir, at no time.

Q. Mr. Tomkins, prior to the time that the Newark Company bought the Kelley stock in May, 1937, had the Newark Company ever had anything to do with gypsum board?

A. No, sir, nothing.

Q. And had the Newark Company, or you yourself, had any connection with licenses from USG with respect to gypsum board, prior to May, 1937?

A. None.

Q. Can you remember whether or not, prior to May 1937, you knew that there were such things as gypsum board licenses running from USG to others?

A. Yes, I had always known, in the industry, that gypsum board was manufactured under patents and sold under license agreements. Early in 1937, in January, the Newark Company took an option on the Kelley Plaster-board Company and made an examination of the business, extending up until May of 1937, and during that examination, of course, the license agreement was presented and the Newark Company became familiar with it, and I did. That was the first time I had seen a license agreement.

Q. Prior to that time you had never seen a USG license bulletin?

3554 A. No, sir.

Q. And prior to that time, prior to 1937, had the Newark Company ever operated in any field under a patent license arrangement?

A. No, sir, never.

Q. After January, 1937, down to the present time, did you ever attend any meeting of the USG board licensees?

A. No, sir, I did not.

Q. So that you have never attended a licensee meeting of the gypsum board licensees, or a meeting attended by the licensor and the licensees, at any time in your entire life, have you?

A. No, that is correct.

Q. As a result of the examination which you say you made of the assets and liabilities of the Kelley Plaster-board Company, can you tell us whether or not you concluded that this Kelley-USG gypsum board license was a valuable asset of the Kelley Company —

Mr. STEFFEN (interposing). I object to that. I don't see that it has anything to do with the direct-examination, and I don't see where it is tending.

Mr. BROMLEY. It has to do with the purchase of the stock.

Justice STEPHENS. It seems to the Court, Mr. Steffen, that it is proper cross-examination to bring out the reasons for taking over the license and taking over the Kelley Company. Is that your purpose, Mr. Bromley?

Mr. BROMLEY. Yes, Your Honor.

Mr. STEFFEN. I have no objection, then, Your Honor.

Justice STEPHENS. The objection is overruled.

Mr. BROMLEY. Will you read the question?

(The question was read by the reporter.)

The WITNESS. Yes, we felt it was extremely valuable, and that on it the ability to manufacture board rested.

By Mr. BROMLEY.

Q. And is that a reason why you went to the extent of obtaining from USG the estoppel certificate, Exhibit 362, about which you testified?

A. That is correct. We believed, our attorney advised us, that we had the right under the license agreement to take it over with the stock, but on his advice we wanted that confirmed by the licensor. For that reason we wrote to the United States Gypsum Company, and they did confirm it.

Q. And in Exhibit 362, you secured a statement from USG, in binding form, that Kelley was not in default under the license, didn't you?

A. We did.

Q. You wanted to make sure of that, too?

3556 A. We did.

Justice STEPHENS. The Court will suspend at this time.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:45 o'clock p. m., of the same day.)

#### AFTERNOON SESSION

3557 (The trial was resumed at 1:45 o'clock p. m., pursuant to recess.)

Justice STEPHENS. For the information of counsel, especially Mr. Johnston, who made inquiry on this subject, the Court will adjourn at the close of the session on Friday, the 25th of February, and it will not resume session until Monday, the 20th day of March, as there will be the better part of two weeks spent on patent hearings and conferences which my colleagues must have in the Court of Cus-

toms and Patent Appeals. We will therefore adjourn at the end of the session on the 25th of February, and resume on Monday, the 20th of March.

How many more witnesses have you, Mr. Steffen, for the Government?

Mr. STEFFEN. I couldn't tell you positively. Ten or fifteen, maybe.

Justice STEPHENS. Have you any estimate as to how much more time you will take? We have had about 30 days of actual hearings.

Mr. STEFFEN. I think we can finish in from 3 to possibly 4 weeks of actual testimony.

Justice STEPHENS. Have you any estimate as to the number of witnesses that the defendants will call, Mr. Bromley?

3558 Mr. BROMLEY. No, sir, not at the present time.

Mr. STEFFEN. I want to make the point that I made at the beginning of Mr. Bromley's cross-examination. The reference that I had in mind, which is referred to by the Committee on Rules, is Volume 4 of Wigmore, Second Edition, Sections 1885, 1886 and 1887, and particularly subparagraph (d) of 1887.

Justice STEPHENS. What does it say?

Mr. STEFFEN. I can read it to you, but it is not explicit upon the point. It says substantially what I said this morning, that the purpose of leading questions is to enable a person to interrogate a hostile witness; and that, conversely, where the witness is friendly, that leading questions would not be permitted for the reason that it would permit the examiner to put answers in the witness' mouth.

Of course, under the rule, Mr. Tomkins is technically hostile to us, and technically friendly to Mr. Bromley, and on that line of reasoning leading questions are permitted by us and not by Mr. Bromley.

I will say to the Court that we have no construction of 43 (b) —

Justice STEPHENS (interposing). Does this refer to 43 (b)?

Mr. STEFFEN. 43 (b) refers back to Wigmore as a general reference, which presumably was what the Committee had in mind in drafting 43 (b).

3559 If Your Honors continue with the position that the Court has taken, I would like to ask to have a



continuing exception to leading questions, for the purpose of the record.

Justice STEPHENS. Will you hand that book to the Marshal and let the Court examine it?

(The book referred to was handed to the Court.)

Justice STEPHENS. Do you wish to consider this, Mr. Bromley?

Mr. BROMLEY. No, Your Honor.

Justice STEPHENS. It doesn't seem to the Court, Mr. Steffen, that that changes the situation as presented this morning. Apparently Mr. Wigmore, at the place where you cite him, is discussing the advantages and disadvantages of the so-called Federal rule which limits the cross-examination to the direct-examination, the subject matter of the direct-examination, as distinguished from the English rule which permits cross-examination on all matters in issue in the case.

In the course of that discussion he mentions the function and purpose of leading questions. But his reference there, it seems to me, is a reference to the discretion of the Court with respect to leading questions. We didn't understand at all this morning that you were invoking that. We understood that you were asserting, under Rule 43 (b),

that the Court has no right to permit that, and 3560 that rule forbids leading questions put to a witness called by you if that witness was a party or the officer of a party,

We still are of the view that that is not the function of 43 (b), nor the effect of Rule 43 (b). Of course, we have not ruled, because such a matter was not presented to us as we understood it this morning, that the Court has no discretion to limit the manner of examining a witness by your opponent if the witness actually seems to be unduly friendly to your opponent's side of the case. The Court's discretion still exists under those circumstances, as we understand it. But we didn't understand you were invoking any such rule as that.

Mr. STEFFEN. We did not intend to raise the question of discretion, and I suppose, as Your Honor states, that at a proper time, if occasion warranted, that you would, of course, exercise your discretion.

Justice STEPHENS. You have a right to ask us to exercise our discretion, yes.

Mr. STEFFEN. I, however, want to raise the point which I spoke of, and would like, for the purposes of the record, to have a continuing exception to all leading questions,

addressed by Mr. Bromley or other attorneys, to witnesses that we call as if upon cross-examination.

Justice STEPHENS. You are entitled to that, and the record may show that your objection is overruled, so  
3561 that your record is perfected.

Thereupon, FREDERICK TOMKINS, the witness on the stand at the time of recess, resumed his testimony as follows:

CROSS EXAMINATION (Resumed) by Mr. BROMLEY.

Q. You said this morning, Mr. Tomkins, in answer to a question by Mr. Steffen, that up to 1937, you felt free to charge any prices for plaster you wanted to. Now what is the fact with regard to the period after 1937? Did you or did you not feel that you had the same freedom to make any charge for plaster that you wanted to?

A. Yes, sir, we had exactly the same freedom.

Q. You were also interrogated this morning with respect to warehousing arrangements. Let me ask you this: In connection with your testimony that you never made any warehousing arrangements, did you refrain from making warehouse arrangements because of any provisions in the USG bulletins, or for your own business reasons?

A. Well, the question never actually came up. To the best of my recollection, we never even considered making a warehousing arrangement with any dealer.

Q. And did you ever consider doing business through warehouses of your own?

3562 A. Yes, we had given that consideration, but had decided against it because it was expensive. We did not feel that the cost justified it.

Q. And that decision, then, was a matter of business policy, was it?

A. Yes. We made one exception. For a time we did maintain a warehouse in Philadelphia, but the cost was excessive and we discontinued it after a comparatively short period.

Q. And was that discontinuance due to anything that was in the bulletins?

A. No, sir, the bulletins had nothing to do with it.

Q. Is it the fact, Mr. Tomkins, that when Kelley merged with Newark in the latter part of 1938, that that merger was put through in order to simplify the manufacturing operations of the business?

A. Yes; it was January, 1939, that the merger took place, and the purpose of it was to integrate the management and reduce administrative costs.

Q. You told us this morning that you obtained an estoppel certificate from USG. That was in May, 1937, when you bought the Kelley stock, wasn't it?

A. When the Newark Company bought the Kelley stock, yes.

3563 Q. And in 1939, the record shows that a consent to assignment of license from Kelley to Newark, from USG, was obtained, and that is Exhibit 16 and Exhibit 364—do you recall that?

A. Yes, I do.

Q. And it is the fact that you got that consent just out of an abundance of caution in order fully and completely to protect your license rights?

A. Yes, our attorneys felt that we should have that consent over and above the consent that appeared to lie in the license agreement itself.

Q. Is it true, Mr. Tomkins, that at all times, a majority of the Directors of both the Calvin Tomkins Company and the Newark Company were common, were the same persons, I mean?

A. At all times since 1937, yes.

Q. And is that fact likewise true with respect to the officers of the Calvin Tomkins and the Newark Plaster Companies?

A. I am not sure that that is exactly true. I believe the officers of the Newark Company were also officers of the Calvin Tomkins Company. I don't believe they were identical; that is, I don't believe they held the same positions in both companies, necessarily.

Q. My question was merely—were a majority of the officers of Newark at all times a majority of the  
3564 officers of Calvin Tomkins Company?

A. Yes.

Q. Now the Calvin Tomkins Company was in the business of selling building material products, wasn't it?

A. It was.

Q. And all of its stock was owned by the Newark Company?

A. That is true, yes, sir.

Q. And all the products manufactured by the Newark Company were sold by the Calvin Tomkins Company, weren't they?

A. They were.

Q. So that, is it accurate to say that Calvin Tomkins Company, a wholly-owned subsidiary of the Newark Company, was the company through which Newark conducted the selling end of its business?

A. What actually took place was a sale of products manufactured by the Newark Company to the Calvin Tomkins Company. Those products were subsequently sold by the Calvin Tomkins Company, a wholly-owned subsidiary.

Q. But forgetting the form which it took, isn't it the fact that the selling end of the Newark business was conducted by the Calvin Tomkins Company?

A. That was the effect, yes.

3565 Q. With respect to the testimony and exhibits relating to the consents to sell manufacturing distributors which were requested by Kelley and the Tomkins Company, and which were granted by USG, in accordance with your direct-examination, are you able to tell us whether any request by any one of your companies for a consent to sell a manufacturing distributor was ever refused by USG?

A. No, no such request was ever refused.

Q. And was any such consent, once granted by USG, ever withdrawn?

A. It was not.

Q. At any time were any conditions, oral or written, ever attached to the grant of any one of these consents by USG?

A. No, I believe the only condition was that the consents were revocable, if that is a condition.

Q. Aside from that, were there any conditions attached to the granting of the consents?

A. I believe not, no, sir.

Q. Were any threats ever made by USG to withdraw any consent, once granted?

A. No, sir.

Q. Will you look at Exhibits 372 and 373, please.

(Exhibits 372 and 373 handed to the witness.)

3566 It is a fact, isn't it, that both of these exhibits, in the first sentence of each, state, "a copy of our price list" is enclosed?

A. They do.

Q. Now at page 3612 of your testimony, you said that your company sent price lists to Oakfield, Structural and Connecticut Adamant, and that this was done by Kelley up until January, 1939, in the instances in which it was done,



and by Tomkins, whenever it was done, after that time. And by "Tomkins" I mean Calvin Tomkins Company.

Now isn't it your testimony that —

Justice GARRETT (interposing). Just a moment, please, Mr. Bromley. That is page 3612?

Mr. BROMLEY. Yes.

Justice GARRETT. In your question you summarized what you understood the questions and answers to mean, did you?

Mr. BROMLEY. Yes, sir, the top of the page mentioning Oakfield, Structural and Connecticut Adamant, and the bottom of the page making it clear that if that was done, it was done by Kelley up to January, 1939, and thereafter by the Calvin Tomkins Company.

Justice GARRETT. Very well.

By Mr. BROMLEY.

Q. Now those price lists that you were there referring to were price lists showing the prices which the Kelley Company, or the Calvin Tomkins Company, as the case might be, would charge to the Oakfield, the Structural, or the Connecticut Adamant; isn't that right?

A. I believe those were dealer's price lists. We never figured out the prices that we would charge to these manufacturing distributors. That is, we never figured the dealer's price and deducted from it the allowed commission or discount and sent a net price to these companies. We advised them of their prices by sending them the dealer's prices, which enabled them to arrive at their own prices by making the deduction in each instance, at every destination.

Q. In order for Structural, Oakfield and Connecticut Adamant to know what they would have to pay to Kelley or Calvin Tomkins for board, they would have to know the dealer price in effect at the time, wouldn't they?

A. They would, unless we made the deduction, which we never did.

Q. And that was because they could not tell, these manufacturing distributors, what they had to pay Kelley or Calvin Tomkins unless they knew the precise amount of the dealer price from which their discount was to be deducted; isn't that right?

A. That is correct, yes.

Q. So this information in these price lists, although they gave dealer's prices, was absolutely necessary for these manufacturing distributors to have in order

to know how much they would have to pay from time to time for board purchased from Kelley or Calvin Tomkins; isn't that right?

A. That is true, yes, sir.

Q. Did you ever have any agreement or understanding of any kind with any of these manufacturing distributors to whom you sent these lists, or otherwise, that they would resell the goods bought from you at those or any other prices?

A. No, sir, we never had any agreements with them to that effect.

Q. And you testified to that effect at the criminal trial, didn't you?

A. Yes, I believe I did.

Q. Now at page 3644, line 7, you were asked this question by Mr. Steffen:

"Q. That is, it would apply upon your sales to Oakfield for Oakfield's own use?"

And you answered:

"A. Yes, I should think so, because their price depended upon the dealer price."

Now when you said "because their price depended upon the dealer price", you meant the price which they had to pay Kelley or Calvin Tomkins, did you not?

A. Yes, sir.

3569 Q. And again, at page 3647, beginning in line 12:

"Q. That was so that Oakfield would be selling to dealers at the prevailing price?

"A. This information was given to Oakfield so that Oakfield would know what the dealer price was.

"Q. And I followed that question up with—so that when they sold to the dealers, they would sell at the right price?

"A. They could if they wanted to."

Now when you used the word, "right" price, didn't you mean their price to their customers in view of their cost?

A. Did I use the word "right" price?

Q. I am afraid you did, I just read it to you.

A. I thought it was Mr. Steffen who used it.

Q. I am sorry, Mr. Steffen used that, and you answered: "They could if they wanted to."

Justice STEPHENS. Perhaps Mr. Steffen, it is not inappropriate to remark that you might have put a word in the witness' mouth. (Laughter.)

Mr. STEFFEN. I think it is very appropriate to use that word.

By Mr. BROMLEY.

Q. When you said, "They could if they wanted to.", in answer to the question, "• • • when they sold to the dealers, they would sell at the right price?", what did you mean?

3570 A. Obviously I meant that if they wanted to sell at the bulletin price, they would have the bulletin price and they could sell at that.

Q. In their sales to their customers, wasn't it important to know, for each manufacturing distributor to know, what his cost was?

A. Surely, of course it was.

Q. Because the price at which he sold to his customers, that is, the price at which the manufacturing distributor sold to his customers, might be influenced or determined by what price the manufacturing distributor had to pay to the manufacturer, mightn't it?

A. That could be the reason, yes.

Q. And isn't it a simple matter of business that before a manufacturing distributor took an order from one of his customers, he would want to know what the dealer price was that the manufacturer was going to charge him from which his discount was to be deducted?

A. Yes, that is perfectly true.

Q. So that it was important that the manufacturing distributors were informed promptly by their suppliers, of any change in the dealer price, wasn't it?

A. It was.

Q. Because any change in the dealer price would affect the cost of the manufacturing distributor's goods  
3571 purchased from the manufacturers?

A. Yes.

Q. And so at page 3646, beginning in line 3, this question, as corrected, was asked you:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price from the dealer?"  
and you said:

"Yes, otherwise they would be at a disadvantage."

Mr. STEFFEN. I don't think that line was ever corrected. It finally eventuated that it was left as it stood.

Justice STEPHENS. My records show that after a considerable debate between counsel on the subject, it was decided that the answer was the answer which the witness gave, or that the question was the question which Mr. Stef-

fen asked, and that any possible correction of the answer should be left to cross-examination.

Mr. BROMLEY. Yes, sir. So I will withdraw that question.

Justice GARRETT. And it was subsequently corrected on a reexamination the next day, I believe.

Justice STEPHENS. I think the reexamination the next day brought out the idea of the word "from". I think this particular question wasn't changed.

Mr. BROMLEY. Yes, sir.

3572

By Mr. BROMLEY.

Q. I will withdraw the question and ask you this: At page 3646, you testified as follows:

"Q. So that it was necessary for Oakfield to know that there was an increase in price so that they would get the right price to the dealer?

"A. Yes, otherwise they would be at a disadvantage."

Then you later gave the same answer to the same question, except that the words "to the dealer" were changed to "from the dealer." Do you remember that?

A. Yes, sir.

Q. Didn't you mean by that, when you answered "Yes" to this question saying "the right price", didn't you mean merely that this information was necessary for the manufacturing distributor to get from his customer a price based upon the cost to the manufacturing distributor as it existed at the time?

A. Yes, sir. If the price were increased, if the dealer price were increased, it naturally followed that the cost to the distributor would be increased, and unless he gave effect in his sale to his increased cost, he would be at a disadvantage. So that it worked both ways. That is, it permitted him to charge the dealer a higher price if he wanted to, to cover his higher cost, and it put him on notice that his cost was going to be increased.

3573 Q. So that if, when a manufacturing distributor like Structural took an order from a customer, and the manufacturing distributor thought the price was \$13 to the dealer, not knowing that your company, pursuant to a USG bulletin, was obligated to charge \$14, the manufacturing distributor would find that he had sold goods for \$13 which cost him \$14 less 12½ per cent?

A. Yes, sir, we had to notify them immediately if there was a change in price, because their costs depended on it.



Q. And if the manufacturing distributor, not knowing of the price increase, charged the old price, his transaction might result in a loss to him because his increased cost might more than wipe out his discount; isn't that right?

A. That is true, that is what I meant by stating that he would then be at a disadvantage.

Q. Now at page 3619, in the middle of the page, you testified about a talk you had with Mr. Kelley prior to your purchase of the stock, I think, and you said that Mr. Kelley told you that manufacturing distributors sold board they purchased from Kelley at the established bulletin prices to the dealer trade. Do you recall that?

A. Yes, sir, I do.

Q. In that conversation, did Mr. Kelley make any statement as to whether or not that was done pursuant to an agreement between the Kelley Company and the 3574 manufacturing distributors?

A. No, sir, I know there was no such agreement.

Q. And he didn't tell you that he had any understanding between his company and the manufacturing distributors which resulted in their reselling the goods at the dealer's price, did he?

A. No, sir, he told us that he had disclosed to us all agreements and understandings that he had, and that was not among them.

Q. And you understood, didn't you, that the prices at which the manufacturing distributors resold the goods was a matter entirely within their own determination?

A. No, sir. At that time I was under the impression, after we took over the Kelley business, after Newark did, that the Newark Company as a licensee did have an obligation to see that the manufacturing distributors to whom it sold board, resold it at bulletin prices to dealers.

Q. Did you get that impression from anything that was ever said to you by anybody from USG?

A. No, sir, that was my own opinion.

Q. Did you get that impression from anything that was ever said to you by anybody?

A. I don't believe I did, no, sir.

Q. Did you ever do anything, Mr. Tomkins, toward attempting to see to it that your manufacturing distributors resold at any price or prices? 3575

A. No, sir. I made inquiries on several occasions as to what their selling policies were in certain instances that our company had been asked to report on.

Beyond that there was nothing that we ever did to attempt in any way to control distributors' prices.

Q. Now those instances to which you have just referred are the two instances brought out in your direct-examination, as to which there was some correspondence, aren't they?

A. Yes, sir.

Q. And you now know, don't you, that in both of those instances, the complaint which the Board Survey Company made was a complaint against your company with respect to a charge that you had not charged the bulletin prices to your manufacturing distributor customers?

A. Well, I don't know that, Mr. Bromley. The complaints of the Board Survey Company are addressed to the Kelley Company, or should have been addressed to the Kelley Company, and I interpreted them to mean that we were to investigate and report back as to the prices at which the distributors were selling board, prices and delivery terms—which is what we did.

Q. And is that all you did?

3576 A. That is all we did.

Q. And isn't it a fact that those are the only two instances, in the entire period of time, where this question was raised with you or your company?

A. Those are the only instances of which I have any knowledge.

Q. Will you look at those two complaints —

Justice STEPHENS (interposing). What numbers are those exhibits?

Mr. BROMLEY. Look at Exhibit 382, please. That is Board Survey complaint dated December 27, 1937.

By Mr. BROMLEY.

Q. In the first place, that is addressed to the Newark Plaster Company, Licensee, isn't it?

A. It is.

Q. Now by what you said a minute ago, you meant to suggest that it should have been addressed to the Kelley Company?

A. Undoubtedly. The Newark Plaster Company was not a licensee.

Q. Because the merger had not yet occurred?

A. No, sir.

Q. So, subject to that correction, looking at it now, do you see that the complaint is addressed to a licensee?

A. Yes, sir.

3577 Q. And do you see that in the first line of the text it says, "A complaint has been filed against your company as follows:"—do you see that?

A. I do.

Q. And then the complaint goes on to give the name of the customer involved, and gives the customer as Oakfield, doesn't it?

A. It does.

Q. Now coming down to the text underneath "Facts Concerning Complaint", it states: "Is reported that Frankford Coal & Supply Company, Philadelphia, through Oakfield Gypsum Products salesman, has offered Plastering Contractor Sam Levin a price of \$14.00 per M, delivered to job. Material is trucked direct from Delawanna, N. J., by local trucking contractor. Licensed price on Plaster Lath delivered in truckload quantity to dealers in Zone 1 is \$14.10 per M."

From that it is apparent, isn't it, first, that Frankford Coal & Supply Company is a dealer?

A. It is.

Q. And, second, that Frankford Coal & Supply Company was offering patented lath to a contractor at \$14.00?

A. Correct.

Q. Now that lath which Frankford Coal & Supply was offering to a contractor for \$14.00 was lath which it had bought from Oakfield, wasn't it?

3578 A. That is implied, yes, "through Oakfield Gypsum Products salesman".

Q. And Oakfield bought the lath from Kelley?

A. It did.

Q. And under the license bulletin, Kelley was obligated to charge Oakfield \$14.10 less 12½ percent, wasn't it?

A. Yes, I believe that covered the sales in Philadelphia.

Q. That is apparent from the last line of that quotation, isn't it?

A. That is correct.

Q. So that if Sam Levin, clear down the line of those transactions, was only paying \$14.00 for this lath, it was a permissible inference that you, the Kelley Company, must have been selling Oakfield at a price lower than the bulletin price, wouldn't you say that?

A. Well, that certainly could be inferred.

Q. And indeed, if you had been given information that

Frankford was making this low price to a contractor, you would have thought, in turn, that Oakfield was selling at a low price, wouldn't you?

A. Yes, that was the basis of our inquiry.

Q. And do you now see that so far as USG was concerned, its inference was that your company was selling Oakfield at a low price, or else this transaction would not have been possible?

3579 A. As I say, that is a possible inference, certainly.

Q. Now the only other instance appears in Exhibit 387, which is a letter from Mr. Bartlett to you. Mr. Bartlett was the man in charge of the activities of USG in seeing that its license bulletins were observed, wasn't he?

A. That is the connection in which I had an occasion to know him.

Q. And do you notice in the second sentence that the charge is that Structural and Newark "are making a regular practice of delivering material direct to jobs"?

A. Yes, sir.

Q. Now the reference to Structural and Newark is explainable by the fact that the delivery to those jobs was made in Kelley trucks, is it not?

A. Yes, Newark should not have been mentioned here, for the same reason that we were not properly charged in the previous complaint.

Q. You mean the reference should have been to Kelley?

A. Yes.

Q. Because the merger hadn't yet taken place?

A. That is correct.

Q. But the fact is that in this instance to which reference is made in this complaint, the Kelley Company had sold goods to Structural and the Kelley Company was making the delivery in Philadelphia?

3580 A. Well, this letter claims that both Structural Gypsum Company and the Newark Plaster Company, which means Kelley, were making a regular practice of delivering material direct to jobs.

Q. But the fact is, at that time, that the deliveries were being made by the Kelley Company's trucks, whether it was a direct sale by Kelley to a dealer or a sale by Structural to a dealer?

A. Yes. I believe Structural was also making some deliveries in Philadelphia.



Justice STEPHENS. You mean that Kelley was delivering for Structural?

The WITNESS. Yes, for Structural's account.

By Mr. BROMLEY.

Q. So that even if Structural had made the sale in this instance referred to, the delivery would have been made by a Kelley truck?

A. Yes, I believe that is what this letter referred to, that it was a delivery made for Structural's account by a truck hired by the Kelley Company.

Q. So that, so far as USG or any outsider was concerned, the transaction would look like a Kelley transaction because of the delivery in the Kelley truck, isn't that right?

3581 Mr. STEFFEN. I think, Your Honor, that this goes quite a long way. Using the rule which the defendants used this morning, the letter speaks for itself. The witness hasn't shown that he can construe it any better than Mr. Bromley, on this point.

Justice STEPHENS. The Court has tried to make plain, before, that it is the view of the Court, and the Court thinks it is a settled rule, that there is a different practice on cross-examination. On direct-examination if you want to prove the contents of a document, you must show the document. On cross-examination it may be that the witness' understanding of a document explains his direct-examination concerning his conduct under it. We think the objection is not well taken.

Mr. BROMLEY. Will you read the question?

Justice STEPHENS. That merely reraises the question on which we ruled under your continuing objection, as to whether you were not examining your own witness this morning, notwithstanding the fact that you were permitted to lead him. But we think this is cross-examination of a Government witness, and that that permits going into the reasons for his conduct and his understanding of these documents.

Mr. BROMLEY. Will you read the question?

(The pending question was read by the reporter.)

The WITNESS. It would look like a Kelley transaction, but the statement is made that the practice was  
3582 directed by a salesman of the Structural Gypsum Company.

By Mr. BROMLEY.

Q. That means, does it not, that the Kelley Company would start its truck out from Delawanna for Philadelphia, with directions to that truck to go to the Structural Warehouse in Philadelphia?

A. Or to the dealer's yard.

Q. Or to the dealer's yard?

A. Correct.

Q. And that unbeknownst to you, a salesman of the Structural Company would intercept the truck and divert it direct to the contracting job; is that right?

A. That was the basis of their complaint, apparently.

Q. Yes.

A. That is correct.

Q. So that I say again, to an outsider not familiar with what was going on, it would look as though the Kelley truck was making a direct job delivery, direct from Delawanna?

A. It would.

Q. Now coming back to Exhibits 372 and 373 again, at page 3750, at the bottom of the page, referring to these exhibits, you were asked this question:

“Q. And when you say that you are eliminating those counties from the trucking area, you mean that 3583 you are no longer trucking into those areas, and that therefore, if you are selling to Oakfield and making shipments to Oakfield's customers, that they couldn't be handled on the former delivered price basis, is that correct?

“A. I don't believe we ever trucked into these areas.”

Now that answer isn't right, is it?

A. No, sir, I was in error.

Q. In the first place, do you notice that the question refers to the Oakfield Company?

A. Yes.

Q. And the Oakfield Company had its place of business at Oakfield, New York?

A. Yes, sir.

Q. And Oakfield, New York, is way over toward Buffalo, isn't it?

A. It is.

Q. And when Mr. Steffen asked you that question, weren't you under the impression that the three counties mentioned in Exhibit 372, to-wit, Delaware, Greene and Columbia Counties, were up near Oakfield?

A. Yes, I assumed they were.

Q. And you now know as a matter of fact, they are down near New York City?

A. I do, yes, sir.

3584 Q. So that your answer, "I don't believe we ever trucked into these areas," was quite wrong, wasn't it?

A. Entirely so.

Q. And the fact is that your company did truck into Delaware, Greene and Columbia Counties?

A. Yes, we trucked into all of the counties where trucking was permitted under the license bulletins in the New York area, and to many in the Philadelphia area.

Q. When you gave that answer, you thought that Berks and Lancaster Counties were out in Western Pennsylvania?

A. I did.

Q. And you now know, don't you, that Berks and Lancaster Counties are just outside of Philadelphia?

A. I do.

Q. So that the answer which you gave at line 5, on page 3751, was completely wrong, wasn't it?

A. Yes.

Q. And you change it now, do you not, so as to state that your company did truck into those areas?

A. Yes, I would like to make that correction.

Q. So that with respect to these counties mentioned in Exhibits 372 and 373, the Kelley Company was notifying its customers of a change in the type of service which Kelley would render to them in those localities, was it not?

A. Yes, we were putting them on notice that we  
3585 would no longer make truckload deliveries in those counties.

Q. And that thereafter your deliveries would have to be made, if at all, by rail; isn't that right?

A. That is correct, yes, sir.

Q. Now these price lists, and this notification of this change, were sent by the Kelley Company to the Paragon Company and the Structural Company because the Kelley Company hoped to sell products to these companies for delivery in these areas, isn't that right?

A. Yes, we hoped we would be able to sell both the Structural Company and the Paragon Company in carloads in these areas.

Q. In these areas, in these five counties?

A. That is correct.

Q. And when you testified in the criminal case, you testified that you hoped to sell the Paragon Company and the Structural Company in these areas—do you remember that?

A. I don't remember it.

Q. But that is the fact, isn't it?

A. I believe it is.

Q. Now the Paragon Company, to which this letter Exhibit 372, is addressed, is the Paragon Company of Scranton, Pennsylvania, is it not?

A. Yes, sir.

3586 Q. And the Paragon Company of Scranton, Pennsylvania, never was a manufacturing distributor, was it?

A. No, sir, except through its ownership of stock in the Oakfield Gypsum Products Corporation.

3587 Q. Well, when you say "except through its ownership", you know, don't you, that the Paragon Company had only a minority stock interest in the Oakfield Gypsum Products Corporation?

A. I don't know what the interest was, but it did have a stock interest.

Q. But so far as the business of the Paragon Company of Scranton, Pennsylvania, is concerned, it did not manufacture plaster, did it?

A. No, sir.

Q. Therefore, isn't it correct to say that it is not a manufacturing distributor in the sense in which that term has been applied to such companies as the Structural and the Oakfield companies?

Mr. STEFFEN. I object to that, your Honor, as calling for a legal conclusion.

Justice STEPHENS. Is there a dispute between the Government and the defendants as to whether Paragon was a manufacturing distributor?

Mr. BROMLEY. Do you concede, Mr. Steffen, that it was not?

Mr. STEFFEN. I should like to make a continuing refusal to concede, and I would also like to say that I think the facts will develop that Paragon was as much a manufacturing distributor as was the Calvin Tomkins Company. The three companies that owned Oakfield were very closely related and had an identity of officers and directors, and they were run for each other's benefit.

3588 fit.



It seems to me that if we are forced to take a position we would take the position that the Paragon Plaster & Supply Company is a manufacturing distributor as much as Calvin Tomkins Company, and for the same reasons.

Justice STEPHENS. The Court asked the question for this reason. Of course in a highly technical sense, whether this company was a manufacturing distributor within the terms used in these pleadings, if it is a matter of dispute in this case, is something that the Court will have to finally pass upon. But nevertheless that term is apparently a term of art in this trade, and it has been used by the Government in its examination of witnesses, and by the defendants. If this witness knows how this company was regarded in the trade, or if he is called upon to testify as to how he regarded it, on this cross-examination, it would seem to the Court not unreasonable, with the understanding that the Court will not be bound by his statement when it comes to a determination of the actual fact, if that is in issue.

We think, therefore, that the objection should be overruled, with the understanding that the Court is not receiving this testimony of this witness on that subject as binding as to the exact nature of this company. You may still contest that. That will protect you sufficiently. It would greatly convenience the examination if the term could be used, on both sides.

3589 Mr. BROMLEY. I point out that they do not claim it to be a manufacturing distributor in their bill of particulars.

Justice STEPHENS. That is true.

Mr. BROMLEY. And if it weren't for the fact that they had offered this letter, this Paragon letter, Exhibit 372, and I had objected because Paragon was not a manufacturing distributor—but the Court admitted it—I wouldn't go into this subject. But it seems to me that it is too clear for words that this company is not a manufacturing distributor and the only thing I can do now is develop it through this witness.

Mr. STEFFEN. I think Mr. Bromley has developed no facts which were not before the Court last Friday afternoon when this same question came up and was duly ruled upon.

Mr. BROMLEY. It did not appear then that Paragon didn't manufacture plaster.

Mr. STEFFEN. I think the whole thing appeared just as clearly then as it does now, that the Oakfield Gypsum Products Corporation is the plaster manufacturing unit, and that the Paragon Plaster & Supply Company is a shareholder, along with the Hard Wall Plaster Company and the other Paragon Company, and own and run the Oakfield Company.

Justice STEPHENS. You may develop what the Paragon actually did in its manufacturing business. The Court will not interpret the use of the term "manufacturing distributor" in the mouth of this witness as being conclusive on the subject of what it is, if there is later to be a contest on the subject. It would seem to be difficult to me, Mr. Steffen, to have a contest on this subject in view of the fact that your bill of particulars did not name this company as a manufacturing distributor.

Mr. STEFFEN. My original objection was to the question which asked Mr. Tomkins what his understanding of the matter was, where Mr. Tomkins' understanding cannot help but be a legal conclusion. It seems to me that it is an immaterial or improper line of questioning.

Justice STEPHENS. The Court has ruled that it will not receive his answer as a legal conclusion. You may proceed.

By Mr. BROMLEY.

Q. I will ask you again—the Paragon Company of Scranton, you have said, was a dealer and a jobber?

A. Yes.

Q. It did not manufacture plaster the way Structural or Oakfield did?

A. No, sir.

Q. Therefore would you not say that Paragon of Scranton was not a manufacturing distributor in the sense that Oakfield or Structural were?

A. No, sir, not at all in that sense.

3591 Q. I will call your attention, Mr. Tomkins, on page 3771, to this question:

"Q. When you say that you have no longer attempted to exert any influence upon what Oakfield or Structural or Connecticut might do, do you mean to imply that you were not interested any longer in whether they maintained prices or not?

"A. No, sir, the only time I ever took this matter up with any of them was where instances had been brought

to our attention of violations."

Now when you said "violations" you meant instances in which USG had complained against your company, did you not?

A. Well, all the complaints that came up in connection with us were addressed to our company.

Q. And when you used the word "violations" there you referred to those complaints addressed to your company, did you not?

A. Yes. My feeling was that our company was being charged with a violation for something that one of these distributors had done.

Q. Now the only instances in which that occurred were these two, in evidence as Exhibits 382 and 387?

A. Yes, to the best of my knowledge, those were the only two occasions.

Q. And you meant the same thing when you used the word "violations" in the second sentence of that answer to which I have just referred, reading as follows:

3592 "We never at any time inquired as to the prices at which they were selling, or made any effort to see that they sold at any particular prices, except for the occasions on which we had been put on notice that the violations had occurred."

A. Well, we interpreted the violations as violations of bulletin prices that had been perpetrated by these other companies, but the violations themselves were chargeable against us, it was our duty to investigate them.

3593 Q. Did you do anything more than investigate and report the facts as disclosed by the exhibits?

A. No, sir. In each case the facts were denied.

Q. And when you used this word "violations" in the second sentence, again you referred only to the two instances disclosed in Exhibits 387 and 382, did you not?

A. Yes, sir, they were the only violations that were ever referred to us.

Q. In your answer just given about the nature of those documents, you meant only to say what your interpretation was at the time you received them, and not what you realize now they actually are, isn't that right?

A. Well, I haven't testified as to what they actually are, Mr. Bromley. At the time, as I have made it clear, I took them to mean that we were to investigate the circumstances and report to United States Gypsum Company. We did just that.

Justice STEPHENS. Mr. Bromley, before you go to another topic, the Court would like to call your attention, and the attention of Mr. Steffen also, in connection with Exhibits 372 and 373, to a statement in the record which puzzled the Presiding Judge when he was reading the record last night. Perhaps it will be cleared up by you in this examination, or by Mr. Steffen later.

At page 3752, beginning with the question at line 16:

"Q. Surely. Now let's take the next sentence, Mr. Tomkins. It says: 'The prices as shown for these re-  
3594 spectve Counties are still the prices which apply when delivered by carload, mixed car or pool carload lots only.'

"Now that is the sort of thing that we were just talking about, is it not, where you take the mill base price and add the freight to destination?"

"A. Well, that means that in the future, prices would be based on the regular mill basing point plus freight method."

Now, if you will turn to page 3795, you will see a statement there by Mr. Steffen commencing at line 5:

"Mr. STEFFEN. I think, your Honor, that the witness has clarified it sufficiently so that we can say that the prices, or the price lists, rather, referred to in Exhibits 372 and 373, are prices referred to in the bulletins, and would be the prices at which the Newark people would sell to dealers. They obviously didn't go through the calculation of having a base price, and then adding to it the freight from a basing point, and so on."

Mr. Steffen's statement concerning the witness' testimony, and the witness' own testimony as just read from page 3752, are in conflict, it seems to me, and it occurred to the Court that that should be cleared while you are on the subject of Exhibits 372 and 373. It need not be done at this moment, but may be done later. I am merely calling it to your attention.

3595 By Mr. BROMLEY.

Q. Look at the second paragraph of Exhibit 372, please. The prices referred to in that paragraph are the prices made up of the mill base price plus freight to destination, are they not?

"A. I would interpret this to mean that these prices are the same as the prices that were previously posted for truck deliveries, and that all the change in the price list



covered was the elimination of these counties from a trucking area. Then the letter goes on to say that the prices shown for these counties are still the prices which apply in carload lots.

In other words, there seems to have been no change in the prices, but simply the elimination of this territory from the trucking area.

Q. We are interested in knowing how those prices were calculated, and you said at page 3752:

"A. Well that means that in the future, prices would be based on the regular mill basing point plus freight method."

That is right, is it?

A. Yes. That would mean that the old truck delivered prices must have been based on a freight rate pricing basis, because they haven't changed.

Mr. BROMLEY. It is true that the trucking delivery prices and the carload prices in some areas are the same, isn't it?

3596 The WITNESS. I imagine they are.

Justice STEPHENS. The Court will take the usual afternoon recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Proceed.

By Mr. BROMLEY.

Q. The manufacturing distributors, such as Oakfield and Structural, to whom you sold patented board at a discount, were in direct competition with you, were they not?

A. In some instances they were, yes.

Q. They solicited, these manufacturing distributors, and sold to the same class of trade that you did, did they not?

A. They did, they sold to dealers.

Q. And having purchased from you, they sold to the same class of trade as you solicited, the same product as you sold?

A. Exactly.

Q. So that in a very real sense, by selling them your patented board you enabled them to stay in business and compete with you, didn't you?

A. As to board products, yes.

Q. And therefore you testified, isn't it the fact, that if one of these distributors took away your customers by underselling you, you would feel free to refuse to supply him that material any longer?

3597 A. Well, the occasion never arose. I think I testi-

fied that that would have been given consideration.

Q. And that would have been true, wouldn't it, Mr. Tomkins, without regard to whether or not your prices were fixed by some licensor?

A. Yes, without regard to that.

Q. You, as a matter of independent business judgment, would stop supplying any distributor who, as you said, consistently and in large volume, undersold you to your customers on the product which you were selling him?

A. Unless I were advised that it was illegal to do it, I would, yes.

Q. Well, you never were advised, were you, that it was illegal for you to do that as a matter of individual action?

A. Not so far, no, sir.

Q. And when you said on page 3705, beginning at line 3:

"Q. But it is pretty clear, as you stated, that if Oakfield or Connecticut or Structural were selling to your dealers at a lower price, you don't believe they would stay in business very long?"

"A. Whether it was board or anything else, no one would."

there you did not mean, did you, that any company other than your own would have anything to do with the decision as to whether or not you would sell such a distributor?

3598- A. No, sir, I never implied that.

Q. And you never had any agreement or understanding with USG or anyone else that you would stop selling any manufacturing distributor who sold below dealer prices, did you?

A. No.

Q. You were asked some questions about excessive dunnage. A licensee who was so intentioned could make a present of perfectly good wallboard or plasterboard, by including in a car of board a large amount of what he called dunnage, could he not?

A. Yes, that is possible.

Q. You said that it was the practice to use defective or broken plasterboard or wallboard to brace the load of good wallboard or plasterboard, did you not?

A. Yes, that is the practice of my company.

Q. Now if a manufacturer used a large amount of perfectly good board, and said he had put it in there for the purpose of bracing the other board, it would be possible for him to give a concession to a purchaser by making him

a present of a substantial amount of perfectly sound board, wouldn't it?

A. Yes.

Q. And you understood, did you not, that this provision that excessive dunnage would be considered to be a violation of the license, referred only to the possible practice of a manufacturer rebating on the price by making a present of a considerable amount of good board, calling it dunnage, when it was not required as dunnage?

A. Yes, it would constitute a rebate.

Q. At page 3729, in talking about the perforated lath, when you were asked why you signed the perforated lath license, you said:

"A. Well, I understood that other licensees had signed the perforated lath agreement —"

Then you were interrupted, and finally Justice Stephens asked you if you had finished your answer, and you said that you had.

Isn't it the fact that it was also a reason for your taking out that license, that you desired to be made competitive with the other licensees, who were competing with you?

A. Yes, I understood, as I stated, that other licensees had taken out that license. We found it necessary to sell perforated lath, and I felt that we had to be in a position to produce it.

Q. And you thought you had to have a license so that you could be in a position to produce it in order that you could compete with the licensees who were operating in your territory, did you not?

A. Well, I made no inquiry as to whether or not the license was necessary, but assumed that it was, inasmuch as the other companies had agreed to it.

3600 Q. By this time, that is the time you took this license, perforated lath had become a very valuable product, much sought after in the market, hadn't it?

A. Yes, and the sale was increasing rapidly.

Q. And you wanted to be in a position, if you could, to sell it lawfully, didn't you?

A. Yes, indeed.

Q. And as you said, Kelley had already, prior to that time, started the manufacture of a machine to accomplish the perforations?

A. Yes, sir, he had started that prior to the Newark Company's acquisition of his stock.

Q. It wasn't Mr. Keady, was it, who told you that all of

the licensees in the business, except National, had a perforated lath license?

A. I believe it was Mr. Keady.

Q. I ask you that because the fact is that they all did not have. Did you know that?

A. I didn't know it. My understanding was that the licensees, particularly those in the East, with the exception of National, had signed this license agreement for perforated lath.

Mr. STEFFEN. I think it ought to appear that that is the fact, isn't it Mr. Bromley?

3601 Mr. BROMLEY. What is the fact, that all the licensees in the East except National had a perforated lath license agreement?

Mr. STEFFEN. Yes.

Mr. BROMLEY. I meant by my statement that Texas never took one, or National.

Mr. STEFFEN. He testified as to National, and he limited his answer to the Eastern manufacturers.

Mr. BROMLEY. All right.

By Mr. BROMLEY.

Q. Now you gave some testimony about minimum quantities, and referring again to Exhibit 372, and the last words in the second paragraph, "minimum quantity 7500 sq. ft.", you said that you understood that the United States Gypsum bulletins at that time set that minimum for pool cars, do you remember that?

A. Did I say that I understood that the bulletins so stated?

Q. That is the way I remember it.

A. In reading this letter I assumed that the bulletins provided for the elimination of the trucking area, and also noted that in specifying the territories for carload and pool carload shipments, it limited the quantity to 7500 square feet. My assumption that that was a limitation of the license agreement was simply because it appears in this letter with the other license agreement limitations.

3602 Q. Did you know that the bulletins in effect at this time did not make any such requirements?

A. No, I didn't know one way or the other.

Q. If you, on the other hand, for the Kelley Company, had determined to make such a requirement, it would not violate the bulletins, would it?

A. Oh, no.

Q. Because the bulletins all the way through only make



provision for minimum requirements—you knew that, didn't you?

A. Yes, sir.

Q. So you were free to place any limitation on the minimum quantities that you would deliver in pool cars that you wanted to, weren't you?

A. Yes, sir, if it was not in the bulletin as a limitation, it was one that we imposed ourselves.

Q. Then you were asked some questions about minimum quantities in truck loads: If a manufacturer should agree with a dealer to sell him 7500 square feet of board at a price, at the truckload price, and then should deliver that over a period of time, as required, in small quantities, say 500 or 1000 feet at a time, would that be rendering a service to the dealer which would be of value to the dealer in dollars and cents?

3603 A. Yes, it would eliminate the cost of warehousing and handling to a large extent, and provide the dealer with a great convenience, and make it possible for dealers with inadequate financial assets to purchase board in small quantities.

Q. So that the 7500 square feet is a normal truckload of board?

A. Usually we deliver board in larger quantities by truck, today.

Q. And if you made a practice of making small deliveries to a dealer, you would normally, in the normal course of business, expect to charge him more?

A. If the delivery costs us more, we would expect to be paid at a higher price.

Q. So that if a manufacturer would agree with a dealer to sell him 7500 feet of board at the price specified for a truckload in a United States Gypsum bulletin, and then proceed to deliver it in dribbles over a period of time, he would in effect be giving the dealer a price concession, would he not?

A. Yes, I would consider that an indirect price concession.

Q. At page 3726 you testified in line 16 that metallized board sold at a proportionately high price. You meant merely, did you not, that metallized board sold at a price higher than plain board or lath?

3604 A. Yes, high in relation, high relative to plain board or lath.

Mr. BROMLEY. May I have the letter from Mr. Tomkins to Mr. Eldred of November 17, 1937?

Justice STEPHENS. Is that in evidence, Mr. Bromley?

Mr. BROMLEY. Yes, sir, it is Exhibit 380.

(Government's Exhibit No. 380 was thereupon handed to the witness.)

By Mr. BROMLEY.

Q. Will you look at that, please, Mr. Tomkins?

A. Yes.

Q. The writing of this letter was initiated by you yourself, and not by anyone from the United States Gypsum, is that correct?

A. That is correct.

Q. And the situation referred to in the letter had to do with a shipment made direct to the contractor's job, which by-passed the dealer's yards, didn't it?

A. That is correct, yes, sir.

Q. Now if any manufacturer such as your company made a practice of delivering, for some dealer, direct to the contractor at the job, that was a business practice which would antagonize dealers generally, wasn't it?

A. Yes, that apparently was what happened in this case.

Q. And when you say, in the second sentence of Exhibit 380, "as I think it possible we may be called upon 3605 for some explanation", you were referring to the fact that you were afraid the dealers would ask you to explain why you were violating that business practice, weren't you?

A. I am not sure at this time exactly what I had in mind other than apparently this transaction had received some publicity. Whether I had in mind we might receive a question from the Board Survey Company, or that we might be called to account by our dealers in Philadelphia, I don't know, at this time.

Q. Well, in the first sentence you say that the publicity, or "excitement" was among the dealers in Philadelphia.

A. Yes, sir.

Q. And they were the buyers?

A. They were the buyers.

Q. And it was that excitement, because they were your customers, which primarily concerned you, wasn't it?

A. Yes, sir, that was our chief concern.

Q. At the bottom of page 3764, in relating your conversation with Eldred, beginning at line 21, you said:

"A. My recollection of it is that Mr. Eldred said he had inquired of his salesman in Philadelphia as to whether

this delivery had been made directly to the job, and that his salesman had denied it."

As in the prior instance, isn't it the fact, Mr. Tomkins, that what you suspected was going on was that your 3606 truck, making the delivery presumably to a dealer in Philadelphia, had been met by an Oakfield salesman on the way, who had diverted the truck to the contracting job?

A. Yes. I believed, if the truck had made a job delivery, which was denied, that it could only have been made at the instance of a representative of the Oakfield Gypsum Products Corporation.

Q. And isn't that why you went to Mr. Eldred and asked him about it?

A. Yes, that is the reason I asked him to investigate it and find out what the facts were.

Q. Because only Mr. Eldred or his salesman would know whether, as a matter of fact, the Oakfield salesman had diverted your truck?

A. Yes, that is correct.

Q. And so far as the dealers in Philadelphia were concerned, all they would know about it was that a Kelley truck had made a direct job delivery, isn't that true?

A. If this delivery had been made, that would have been true, yes, sir.

Q. So that even though, if it had been done, the diversion was the result of an Oakfield act, nevertheless, the Kelley Company would get the blame so far as the dealers were concerned, isn't that right?

3607 A. Yes, the Kelley Company was getting the blame.

Q. Now in the Bartlett letter to you of December 27, 1937, which is Exhibit 381, you have already explained that the letter should have been addressed to Kelley instead of Newark, because Kelley and not Newark was the licensee, have you not?

A. Yes, sir.

Q. Can you explain to us why it was that dealers were opposed to job deliveries?

A. Well, basically it takes the control of the dealer's business away from him. If a dealer does not purchase materials, warehouse them and subsequently deliver them to jobs, he has no real function, he becomes more in the nature of a broker than a dealer.

Q. And it is the fact, isn't it, that it is and always has been the attitude of these dealers in this country that manu-

facturers who sell to dealers should deliver the goods to the dealer, and not to the dealers' customers?

Mr. STEFFEN. I object to that as being entirely too broad. No witness can answer what all dealers in this country object to, or how all deliveries are made.

Justice STEPHENS. Well, if the phrase "this country" is to be construed as being used with all dealers, it is too broad. I thought the witness would understand the question to mean dealers in this trade in the area which we are discussing.

3608 If the witness doesn't understand that, you had better rephrase the question, Mr. Bromley.

Mr. BROMLEY. I will withdraw the question.

By Mr. BROMLEY.

Q. Isn't it true that as far as you know the situation, that the dealers in your area with whom you are acquainted object to a manufacturer making a delivery direct to a job, on a sale to a dealer?

A. Yes, sir, all of the dealers with whom I have had experience feel very strongly on that question. They do not want manufacturers delivering to their customers directly to the jobs.

Q. And therefore it is and always has been your business policy to deliver goods sold to dealers, to the dealer's place of business?

A. Yes, sir, for that and other reasons.

Q. Now, coming to the second instance, the Structural situation in Philadelphia, and particularly Mr. Bartlett's letter to you of May 17, 1938, which is Exhibit 387, again this letter, you say, was erroneously addressed to Newark because Kelley at the time had the license, and not Newark, isn't that right?

A. That is right, yes, sir.

Q. And again, in the instance referred to here, Kelley was making the deliveries to Structural in Kelley trucks.

That is right, isn't it?

3609 A. Well, in trucks either owned by Kelley or hired by Kelley.

Q. Now will you look at the answer of May 20, 1938, which is Exhibit No. 388. In the second paragraph there is a reference to "irregularities". You have told us, have you not, that that referred to reports that you had that Structural was selling board bought from the Kelley Company at prices below Kelley's prices, to dealers?

A. Yes, that or deliveries to jobs.



Q. Now isn't it the fact that you had decided that the Kelley Company would not sell in Philadelphia prior to the time that you received Exhibit 387?

A. We had decided not that the Kelley Company would not sell in Philadelphia, but that it would not continue to deliver for the account of Structural in Philadelphia.

Q. I see. And you had decided that prior to the time that you had received Exhibit 387, hadn't you?

A. Yes, simply on the basis of cost.

Q. And didn't you discontinue making sales to dealers in that area, yourself?

A. No, we reduced our volume of business in Philadelphia. We did not discontinue all sales in Philadelphia, then or at any time.

Q. And isn't it the fact that in your use of the word "irregularities" in Exhibit 388, you meant only to  
3610 indicate that your discontinuance was a matter of business policy so far as Kelley was concerned, and had nothing to do with the performance of any obligation which you may have assumed that you had under the license?

A. No, there had been no question raised. We had discontinued the sale in Philadelphia to Structural several months before we were put on notice that Structural was believed to be quoting low prices for delivery direct to the job.

Q. Is it the fact that in localities other than the Philadelphia area, you went right ahead selling Structural as before?

A. Yes, always.

Q. So that then it is the fact that so far as this complaint is concerned, Exhibit 387, you never went to anybody representing Structural with respect to it?

A. To the best of my knowledge we did not. We were not doing business with Structural in the territory covered by this complaint, and we so advised the United States Gypsum Company.

Q. How much of your business, during this period of time, up until say 1943, was represented by sales to manufacturing distributors?

A. It would be a very rough estimate that I could give you on that.

3611 Q. How much?

A. Maybe at the rate of five or six million feet per year, to all distributors, out of a total of roughly thirty million feet.

Mr. BROMLEY. Now may I have the United Clay Products invoice, Exhibit 375-C?

(Thereupon, Government's Exhibit No. 375-C was handed to the witness.)

By Mr. BROMLEY.

Q. Will you please look at that, Mr. Tomkins?

Before I go to that, Mr. Tomkins; did you ever have any agreement or understanding of any kind with respect to the prices of gypsum products other than white plaster?

A. We never had any as to white plaster or any other gypsum product, except board.

Q. Now I want you to assume for the moment, if you will, in connection with Exhibit 375-C, that the Kelley Company had a mill at Delawanna, New Jersey, which was a basing point mill, and that Oakfield Gypsum Products Corporation had a place of business in Washington, and that you were selling patented plasterboard to Oakfield.

Justice STEPHENS. Please read that question. The Court's attention was on this exhibit, and I missed it.

(Thereupon, the pending question was read by the reporter.)

3612

By Mr. BROMLEY.

Q. The price which Kelley would charge Oakfield would be the mill base of \$13, plus the freight from Delawanna to Washington, would it not?

A. That is correct.

Q. And in the instance on Exhibit 375-C, that price would be \$14.96 in Washington, if the freight there represented the freight between Delawanna and Washington?

A. Yes, that is correct.

Q. Now isn't it the fact that it is the universal practice for customers of manufacturers to be charged a price made up of the mill base price, plus the freight to destination?

Mr. STEFFEN. I object to that, your Honor, on the ground that the word "universal" calls for so much information —

Mr. BROMLEY (interposing). I will withdraw the question.

By Mr. BROMLEY.

Q. In this business, isn't it the usual custom for the manufacturer to charge the customer a mill base rate to which the freight to destination has been added?

A. Yes, that is the usual custom.

Q. And isn't it the usual practice for the customer, when he gets the shipment, to go to the railroad and pay the freight bill?

A. Yes, that is customary.

Q. So that at that point, if the customer had paid the manufacturer, he would have paid the freight twice, 3613 wouldn't he?

A. Yes, if the manufacturer included it in his invoice.

Q. Therefore, the invoice always shows on its face a freight credit to the customer, doesn't it?

A. In that instance it does, yes, sir.

Q. And the freight credit which is shown to the customer is always the amount of freight which the customer actually pays the railroad, isn't it?

A. Yes, it would have to be.

Q. It would have to be?

A. Yes.

Q. Now since the invoice is generally sent after the event, at the time the customer receives the invoice he has already paid the railroad freight, and sent his freight bill to the manufacturer, and the manufacturer has put on the invoice a credit in the sum represented by the amount of the freight bill, isn't that right?

A. Well, I think sometimes our invoices beat the shipments to the customers. They should. The invoices are made on the day of shipment, and usually get there ahead of the shipment.

Q. But whatever the fact is, the credit which you give the customer is always the freight which he pays to the railroad?

A. Yes, I believe that is correct?

3614 Q. Now in this instance the freight which was a part of the price was \$1.96, was it not?

A. Yes, it was.

Q. That was the freight from Philadelphia to Washington, wasn't it?

A. Yes.

Q. That was because Philadelphia was a basing point and Delawanna was not?

A. That is correct.

Q. And the reason that you only charged your customer \$1.96 was that since USG had a mill at Philadelphia, it could undersell you unless you charged the customer in Washington the same freight rate that USG would charge the customer, isn't that so?

A. Yes, that is correct.

Mr. STEFFEN. The reason is that the bulletins provided for that price.

By Mr. BROMLEY.

Q. That would have been true without any bulletins, wouldn't it? You couldn't have competed with USG if it had a mill in Philadelphia and you had one in Delawanna, without some such arrangement?

A. We either would have had to sell at a lower price at our mill, or absorb some of the freight so as to equalize our price with the United States Gypsum Company's price.

Q. Coming back to Exhibit 375-C, the fact is that 3615 the \$1.96 is the freight from Philadelphia to Washington which goes into the price of \$14.96?

A. Yes, that is the rate.

Q. That is the rate from Philadelphia to Washington?

A. That is correct.

Q. Now the freight credit that you gave Oakfield is the amount of freight which was actually paid by the customer that received the goods in Washington, isn't that correct?

A. Yes, that was figured at 19 cents.

Q. And that was because the actual freight paid to the railroad was the freight from Delawanna?

A. That is right.

Q. Now of course in this instance Oakfield did not pay the railroad, did it?

A. No, in this instance probably Oakfield's customer, the United Clay Products, paid the railroad.

Q. The United Clay Products paid the railroad \$77.94, but it would be the fact, wouldn't it, that Oakfield on its invoice to United Clay Products, would give United Clay Products a credit in the same amount—that is, the freight actually paid by United?

A. Yes.

Q. And that would be because Oakfield would probably charge United \$13 plus \$1.96, the going dealer price, is that right?

3616 A. That is correct.

Q. So that at that moment of time, the customer, United, would have paid the freight twice, once in the price to Oakfield, and once to the railroad?

A. If that had been done.

Q. And that is the reason that on the invoice from Oakfield to United, Oakfield would give a credit of \$77.94, the



amount which United had paid the railroad for freight?

A. Presumably it would.

Q. And since Oakfield had given that credit to United, Kelley in turn would give credit to Oakfield in the same amount, is that right?

A. That is right.

Q. That would result in Oakfield giving United a credit of \$77.94, which was \$17 more than the freight in the delivered price?

A. Yes, \$17 more than the 14-cent freight rate would be.

Q. And Kelley would give Oakfield, likewise, a credit for \$77, which was \$17 more than the amount of the freight which Kelley got in the delivered price?

A. That is right.

Q. So that it would end up by the Kelley Plasterboard Company absorbing \$17 of freight?

A. Yes, that is the difference between the freight from Philadelphia to Washington and the freight from 3617 Delawanna to Washington.

Q. And it would end up with Oakfield paying \$13 plus the Philadelphia freight of \$1.96, less 12½ per cent on \$13?

A. That is correct.

Q. And it would end up with United paying for that, \$13 plus \$1.96, or the Philadelphia freight?

A. Yes.

Q. Now with relation to Exhibit 374, which is the letter notifying the Oakfield Gypsum Corporation of a freight increase, look again at that Exhibit 375-C. If, at the time that this transaction was accomplished, the freight rate from Philadelphia to Washington had been increased from 14 cents to 15 cents, and Kelley had known about it but Oakfield had not, it would have resulted in a loss to Oakfield, wouldn't it?

A. Yes.

Q. Because if Oakfield had not known that the freight from Philadelphia to Washington was 15 cents, instead of 14, Oakfield would have charged United \$14.96?

A. Yes.

Q. And then when Oakfield had come to get its bill from Kelley, it would have been charged, for the same board, \$15.10, or 15 cents times 1400, instead of 14 cents times 1400, is that right?

A. That is correct.

3618 Q. A 15-cent freight rate on 1400 pounds, instead of \$1.96, would be \$2.10.

A. That is right.

Q. So that the price which Kelley would charge Oakfield, based on the new increased 15-cent rate, would be \$13 plus \$2.10, or \$15.10, whereas Oakfield, not knowing of the increase, would have accepted an order from United at the old price of \$14.96?

A. That is true; yes, sir.

Q. And Oakfield would then be out 14 cents per thousand feet because of its ignorance of the freight increase which went into the price, is that correct?

A. That is correct.

Q. So do you now say that Exhibit 374, the freight notification sent to Kelley to Oakfield, was information which Oakfield should have in connection with its purchases of patented board from the Kelley Company?

A. Yes, it was information which Oakfield would have to have.

Q. Because any company would want to know its cost before accepting an order from a customer at any price, wouldn't it?

A. It is a good practice, yes. (Laughter.)

Mr. BROMLEY. That is all.

Justice STEPHENS. How much redirect examination do you have, Mr. Steffen?

3619 Mr. STEFFEN. I will try to make it very brief, your Honor, because I think Mr. Tomkins wants to get away.

Justice JACKSON. Will you be finished by four o'clock?

Mr. STEFFEN. Possibly.

Mr. O'DONNELL. If the Court please, I have a few questions on cross-examination which I don't believe will take more than five minutes at the most.

Justice STEPHENS. Very well, proceed.

#### CROSS-EXAMINATION by Mr. O'DONNELL.

Q. Mr. Tomkins, I believe you testified that the Newark Plaster Company had been engaged in the manufacture of white plaster for a great many years. What was the date of the incorporation of the company?

A. The Newark Plaster Company was incorporated in 1911.

Q. And from 1911 down until the purchase of the stock of the Kelley Company, it had never sold its plaster to the dealer trade, or thereafter, as far as that goes?

A. It made all its sales to the Calvin Tomkins Company.

Q. The Newark Plaster Company was, as I understand it, a New Jersey corporation.

A. Yes.

Q. And the Calvin Tomkins Company was a New York corporation?

3620 A. Yes.

Q. Was the Newark Plaster Company, throughout the period that it was engaged in the manufacture of this white plaster, known to the dealer trade for the product which it manufactured?

A. No, it was not. The dealer contacts were all made by Calvin Tomkins Company.

Q. Now with reference to the Kelley Plasterboard Company, at the time the Newark Plaster Company purchased its stock, was the Kelley Plasterboard Company known to the dealer trade for the products which it manufactured?

A. Yes, it was.

Q. And throughout the period from 1937 through to 1939, that is, to January 1, 1939, at which time the Newark Plaster Company merged the Kelley Company, wasn't it to your interest to maintain the two companies as separate and distinct legal entities?

A. We believed there was an advantage in continuing the operation of the Kelley Plasterboard Company as nearly as possible in the same way that it had operated prior to our acquisition of the company.

Q. After the Newark Plaster Company had acquired the stock of the Kelley Plasterboard Company, did the Kelley Plasterboard Company continue to maintain its own office, separate and distinct from that of the Newark Plaster Company?

A. It did. It operated in exactly the same way it had prior to the change in stock ownership.

3621 Q. And where was the office of the Kelley Plasterboard Company located?

A. Delawanna, New Jersey.

Q. Did the Kelley Plasterboard Company have a plant superintendent, separate and apart from the plant superintendent of the Newark Plaster Company?

A. It did.

Q. And who was he?

A. Mr. Loeffler.

Q. And had Mr. Loeffler been the plant superintendent of the Kelley Plasterboard Company prior to the time that the stock was purchased by the Newark Plaster Company?

A. He had, for many years.

Q. Did the Kelley Plasterboard Company have a different office plant manager from that had by the Newark Plaster Company?

A. Yes, it did.

Q. And they had that office plant manager throughout the period from 1937 to January, 1939?

A. Correct.

Q. Who was he?

A. Mr. Wileman.

Q. And he had been the office plant manager of the Kelley Plasterboard Company prior to the time when the Newark Plaster Company purchased its stock?

3622 A. That is right.

Q. And did the Kelley Plasterboard Company also have a sales manager separate and apart —

A. (Interposing.) It did. Mr. McGrath was the sales manager who continued in that capacity.

Q. And he had been sales manager of the Kelley Plasterboard Company prior to the purchase of its stock by the Newark Company?

A. Yes.

Q. Were the employees of the Kelley Plasterboard Company, as far as possible, maintained intact as those who had previously worked for Mr. Kelley?

A. Yes, the same employees were retained, and as few changes as possible were made.

Q. Now I think you testified that the Newark Plaster Company had larger facilities for the manufacture of white plaster than it found necessary to use in furnishing the dealer trade with white plaster?

A. That is correct.

Q. And after the purchase of the Kelley Company stock, did the Newark Plaster Company use those facilities for the manufacture of stucco?

A. It did.

Q. Was that stucco manufactured by the Newark Plaster Company throughout the period from 1937

3623 through to the early part of 1939, sold by the Newark Plaster Company to the Kelley Plasterboard Company?

A. Yes, it was sold by Newark to Kelley.

Q. And paid for by the Kelley Plasterboard Company?

A. It was.

Q. Which keeps its own books—or rather, kept its own books of account in reference to these transactions?



A. That is right.

Q. After the merger of the two companies on January 1, 1939, did the Newark Plaster Company sell patented board or lath direct to the dealer trade?

A. No, it did not. It sold board to the Calvin Tomkins Company.

Q. As it had done when it was a manufacturer of white plaster, from that time on the Newark Plaster Company likewise sold all of its board to the Calvin Tomkins Company?

A. Yes, sir.

Mr. O'DONNELL. If the Court please, there is one matter that I think might be cleared up by this witness.

On page 3765 of the transcript, line 13, your Honor asked this witness, or perhaps the question was addressed to Mr. Steffen:

"Justice STEPHENS. Is it being offered as a declaration of Newark or Kelley?"

3624 I find that the witness did not make it clear as to which company this letter was written by.

Justice STEPHENS. What letter?

Mr. O'DONNELL. Exhibit 380, to which your Honor was referring at the time that question was asked. Mr. Steffen's reply was merely:

"Mr. STEFFEN. On one part, yes."

Justice STEPHENS. That is the letter relating to the alleged excitement among dealers in Philadelphia, and the one which referred to Harry McCormick?

Mr. O'DONNELL. That is right, your Honor.

Justice STEPHENS. What is your point?

Mr. O'DONNELL. It appeared that your Honor was addressing that question to Mr. Steffen, I believe, as to whether or not this particular letter was being offered as a declaration of Newark or Kelley and there was no reply by Mr. Steffen to your Honor's question.

Justice STEPHENS. Mr. Steffen said:

"On one part, yes."

I am not sure that I understand what your point is, Mr. O'Donnell.

Mr. O'DONNELL. As I understand your Honor's question, I believe you asked Mr. Steffen if this letter was being offered as a declaration of Newark or Kelley. The response of Mr. Steffen does not appear to answer that question.

3625 Justice STEPHENS. Do you wish to expand your answer, Mr. Steffen? The answer is not clear. It

says: "On one part, yes." I don't quite see what that means.

Mr. STEFFEN. I don't either, your Honor. I think what I should have said was—yes, and that we regard Newark and Kelley at this time as being substantially one concern. Certainly Mr. Tomkins was acting for—he was president of Newark, I believe, and was also acting as president of Kelley. So that as far as I know, there is no issue on the responsibility for the actions of Kelley, and I had not intended to draw any distinction.

Mr. O'DONNELL. Could the witness be shown a copy of Exhibit No. 380?

The WITNESS. I have it here, Mr. O'Donnell.

By Mr. O'DONNELL.

Q. Mr. Tomkins, in writing the letter identified as Government's Exhibit 380, were you writing that letter as president of the Kelley Plasterboard Company, a licensee of USG Gypsum Company?

A. Yes.

Mr. O'DONNELL. I wish to make an objection to this letter being offered by the Government as an admission against the Newark Plaster Company.

I have no further questions.

Justice STEPHENS. Let the Court see the original letter, Mr. Marshal.

3626 (Thereupon, Government's Exhibit No. 380 was handed to the Court.)

Justice STEPHENS. Do you wish to be heard on that, Mr. Steffen? The witness having testified that he was writing Exhibit 380 as an officer of Kelley, Mr. O'Donnell objects to it being received in evidence as a declaration of Newark. What is your contention with respect to that?

Mr. STEFFEN. Our contention is that Newark was responsible for what Kelley was doing during the period after they purchased the stock of Kelley. The letter is certainly binding upon Mr. Tomkins because he was acting in both capacities. The evidence has developed that the directors, or a majority of them, were the same, and that the officers, or a majority of them, were the same, and that the business was under the almost complete control of Mr. Tomkins, who was also president of Newark.

It seems to me that that is sufficient to show that the letter is admissible against Newark and Kelley, and of course against Mr. Tomkins.

Justice STEPHENS. The objection will be overruled, with

the understanding that how far this exhibit binds Newark is a matter which will ultimately be determined when the argument is made at the close of the case with respect to all the evidence as binding against any defendant.

3627 Mr. STEFFEN. I should like to ask two or three questions.

Justice STEPHENS. You may.

REDIRECT EXAMINATION by Mr. STEFFEN.

Q. I think you testified, Mr. Tomkins, in answer to a question of Mr. Bromley's, that you were free to sell plaster at any price you saw fit. Isn't that correct?

A. That is correct.

Q. And that you have been, even after you became a licensee of USG?

A. Yes, sir, we can set our own prices for the sale of plaster.

Q. Now Mr. Bromley made an illustration of a case where a manufacturer had sold board, and also had sold plaster which at that time was selling at \$10 on the market, at a \$2 price. You would regard that as a subterfuge or a rebate, would you not, on the sale of board?

A. I certainly would, yes, sir.

Q. And would you think that you were free to sell plaster at that price under the bulletin regulations?

A. Not if I considered it a rebate. If I were establishing a price for plaster, I can do that in my own discretion, but if I am doing it as an evasion of a contract I have made, I would consider that to be improper.

Q. Now you testified that you regard the license agreements as very valuable assets, and that you  
3628 considered that when you bought the Kelley stock. Do you remember that?

A. I do.

Q. Did you make any investigation at that time of the patent situation?

A. I did not, no, sir.

Q. What did you base your understanding on to the effect that those were very valuable assets?

A. The fact that gypsum wallboard in the East had been manufactured under these patents for a substantial period of time.

Q. That is, it was your understanding that it had been manufactured under those patents?

A. That was my understanding. I did not feel that we would be justified in undertaking to manufacture a

board without a license agreement, and consequently find ourselves entangled in a lawsuit. I didn't feel that it was necessary for my company, which was a small one, to investigate the validity of the patents, or the legality of the license agreement, when it had been established in the industry and apparently had been unquestioned for a number of years.

Q. In other words, you took the license agreement and the patents at face value?

A. Exactly.

Mr. STEFFEN. I have no further questions.

3629

RE CROSS EXAMINATION by Mr. BROMLEY.

Q. Did you submit to your counsel, Mr. DeWitt, the matter of an opinion on the legality of the license?

A. He investigated the legal features of the entire transaction, in acquiring the Kelley Company. I know he read the license agreement, and I assume it met with his approval, as he made no objection to it.

Justice STEPHENS. Is there any other recross?

(No response.)

Justice STEPHENS. Mr. Adams, the Court will have to ask you to come back tomorrow morning to be heard on the Redfield matter and on Exhibit 324, I believe, which is the answer in the Beaver Products case.

May this witness be excused now?

Mr. STEFFEN. Yes, your Honor.

Mr. BROMLEY. Yes, sir.

Mr. JOHNSTON: If the Court pleases, before we adjourn I would like to inquire if a set of the exhibits that are to be used tomorrow is available, so that we can have them tonight?

Mr. STEFFEN. They are available with the clerk.

Justice STEPHENS. And you may obtain them from the clerk.

You are excused, Mr. Tomkins. Thank you for attending the Court.

(Witness excused.)

Justice STEPHENS. Announce the recess.

(Thereupon, at 4:15 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 15, 1944.)



3632 IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS-CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; BROR H. DAHLBERG; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, DEFENDANTS.

SEVENTH FLOOR, INTERNAL REVENUE BUILDING,  
WASHINGTON, D. C., TUESDAY, FEBRUARY 15, 1944.

The above-entitled cause came on for further hearing at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

Appearances. (Same as heretofore noted.)

3640 ARGUMENTS ON QUESTIONS OF LAW

Justice STEPHENS. We will next hear argument on the two questions of law which have been raised. One was with respect to Exhibit 324, the Beaver Products answer, and the other was with respect to the alleged waiver of privilege with respect to the exhibit identified in the Grand Jury proceedings by Mr. Redfield. What number was that?

Mr. ADAMS. Exhibit 233.

Mr. STEFFEN. I am handing the Court mimeographed copies of our brief, and I wanted to call Your Honors' attention to the fact that we made one typographical error. Paragraph 27 was listed as 28.

Justice STEPHENS. Where is that?

Mr. STEFFEN. On the first page, and it has now been corrected.

Justice STEPHENS. Exhibit 324 is the answer of Cer-

tain-teed in the Beaver Products case, is it not?

Mr. ADAMS. That is right.

Justice STEPHENS. And Exhibit 233 was the letter from Mr. Redfield?

Mr. STEFFEN. Yes.

Justice STEPHENS. Mr. Adams, since you are the moving party as to Exhibit 324, you may proceed on that topic.

Mr. ADAMS. I think the record shows that this argument is in support of a motion by Certain-teed Products to strike out Exhibit 324, on the ground that it should not originally have been received in evidence since the exhibit is the answer of the defendant Certain-teed Products Corporation in this suit in the Northern District of Illinois

between it and the United States Gypsum Company, 3642 and is not a verified answer. Consequently, in our view, it is not admissible in evidence in this trial as binding upon the defendant Certain-teed Products, or as constituting an admission by it.

As I see this problem, there doesn't seem to be any substantial difference between the Government and ourselves as to what the rule is. I think probably this question rather turns on the application of this rule, as is so frequently the case, particularly when you are dealing with matters of evidence.

The rule has become firmly imbedded in the procedural cases in the Federal courts, and in our brief—I won't refer to them now specifically—we have set out the cases which seem to us to say that where a pleading is not under oath, and is not signed by the party but is only signed by counsel, it is not competent to prove an admission by the party unless there is a showing, on the part of the person offering the document, that the facts contained in the pleading were known to the party, communicated by the party to his counsel, and the counsel was instructed by the client to put the facts or the statements in the pleading.

It seems to me that that is a very wise rule. I don't want to slander the entire profession. It does seem to me, however, that it is very sensible that counsel 3643 should not be permitted to commit their client merely in a pleading, where such commitment would affect the client's rights in a subsequent and other proceeding.

During the course of the first proceeding where the pleading is offered, the client has a right to change its position

in the course of the proceeding, as the facts may develop. Therefore, it can't be harmed particularly by what statements counsel may have made, in perfectly good faith, in behalf of the client.

When we come to a later and other proceeding, it seems to me that you should not permit counsel, in the absence of a clear showing that the client knew about the facts that are alleged and that the client authorized counsel to put those facts in the pleading, to put that pleading in evidence in the later and other proceeding.

Moreover, as I will touch on later, it is important that the client should not be bound by the assertions or conclusions of law of his counsel. That seems to me to be a very practical and at the same time important reason for the rule. If counsel wish to take a legal position, as in an answer as they did in this case, they are stating legal conclusions which the client doesn't know anything about, and wouldn't understand if he did.

Now when you look at this case—the complaint is in evidence, it was a suit by the United States Gypsum Company which sought fundamentally to restrain Certain-teed, or rather, Certain-teed and Beaver, from going through with this transaction whereby Certain-teed was acquiring the Beaver assets, on the fundamental ground that to do so would deprive the United States Gypsum Company of important rights under this license agreement—a completely different issue faces this Court here. Certain-teed's counsel put in an answer. In the course of the answer, particularly in paragraphs —

Justice STEPHENS (interposing). Will you please restate briefly—I missed one or two words that broke the connection—please restate briefly the nature of the suit by United States Gypsum against Beaver Products?

Mr. ADAMS. As I understand the suit, the purpose of the suit was permanently to restrain Certain-teed and Beaver from consummating the transaction.

Justice STEPHENS. What transaction?

Mr. ADAMS. Whereby Certain-teed was about to acquire the assets of Beaver, it being contended that that would deprive the United States Gypsum of substantial rights under the license agreement, it being apparent that Certain-teed did not intend to follow the provisions of the agreement and that would be a way for Certain-teed and Beaver to evade the license agreement.

3645 It would seem to me that the issues were different than they are in this case. However, I don't want

to go into the question of the issues, here.

We are particularly interested in the paragraphs of the answer which are paragraphs 27, 28 and 29. I do not now propose to argue whether or not those statements constitute an admission, except in one limited sense, as I think that has already been determined by the court in its previous ruling. I merely call attention to it so that Your Honors may see now the reason why the document was offered.

The pleading itself was signed by counsel, it was not signed in any way by the client, not verified. Verified pleadings, as the Court of course knows, constitute, in a sense, a solemn admission and are admissible. This was not verified. Therefore, the question arises as to whether or not the Court can properly say whether the filing of this pleading was authorized—I don't think that perhaps is a proper word—whether or not, under these cases, the client knew about it and instructed the counsel to make this defense on these facts in its behalf.

We say that there is absolutely no evidence upon which this Court can find that fact. The Government, on the contrary, says that circumstantially—a favorite device of the Government when it knows that there isn't any direct evidence and can't obtain any such evidence, to say that circumstantially something is so.

Well, in this case we say that isn't even any circumstantial evidence which would amount to compliance with the rule, showing a connection and knowledge and understanding by the client of what was being done.

Justice JACKSON. Where in the world did counsel for Certain-teed secure knowledge of the things that are set out in those paragraphs, particularly paragraph 28?

Mr. ADAMS. They might have secured knowledge of those facts in almost any number of ways.

Justice JACKSON. And that is what skillful counsel would do?

Mr. ADAMS. He certainly would. I think certainly that in any case, counsel gets his facts where he can and puts in those facts.

But when it comes down to a point of binding his client by those facts, I think it is a wholly different question.

Now in this case, the Government starts but by saying—I must say to my surprise—referring to page 2 of their memorandum, that "Members of the Cravath firm were present at conferences of the Certain-teed officers when the matters alleged in Exhibit 324 were being considered, as



Mr. Adams admitted before this Court (Tr. p. 1917)."  
That is not so. The transcript at page 1917, which I have  
before me, shows that we were discussing an exhibit  
3647 which was excluded from evidence and is not before  
this Court, and all I said was:

"I am in a position to prove, your Honor, that at that  
time Certain-teed was advised by the Cravath firm, and  
that Mr. Adkins was associated with that firm."

I ask Your Honors to place that statement against the  
statement in the Government's memorandum, which says  
specifically: "Members of the Cravath firm were present  
at conferences of the Certain-teed officers when the matters  
alleged in Exhibit 324 were being considered, as Mr. Adams  
admitted before this Court (Tr. p. 1917)."

I think that disposes of that suggestion by the Govern-  
ment.

Justice JACKSON. Well, your alleged admission here  
pertains to what exhibit? You said it didn't pertain to  
Exhibit 324.

Mr. ADAMS. My alleged admission referred to Govern-  
ment's Exhibit No. 210, which was a document having to do  
with a conference which the Government said took place on  
February 2, 1928. We had an argument there about privilege  
on that document. The Court finally held that the  
document wasn't properly identified. The Court didn't  
finally hold that it was to be excluded on the ground of  
privilege, but the Government has never yet produced a  
witness who could identify the document, and it isn't in  
evidence.

3648 So the Government is taking the liberty of talking  
about a document which is not in evidence, and try-  
ing to commit me to a statement about that document which  
isn't true. So that statement, as far as the Government is  
concerned, is wrong.

Now the next point that the Government makes is that  
there was an exhibit which was introduced in evidence as  
No. 212, which is quoted on page 3 of the Government's  
memorandum, dated March 1, 1928. I think the important  
part of it is quoted by the Government, and it is not neces-  
sary for the Court to look at the whole exhibit. However,  
that was a memorandum that George M. Brown made and  
has identified in this case.

Now the Government says that the wording of paragraph  
27 is almost a paraphrase of the last paragraph of that  
memorandum, which they then quote. We don't agree.

Nor do we agree that the statements contained in paragraphs 28 and 29 of the answer have anything to do with the suggestions contained in that paragraph of the memorandum. However, I think that it is very important, and the Government has wholly failed, to call to the Court's attention what Mr. Brown's testimony was.

He was asked, at page 2762 of the record:

"And do you recall what the nature of your defense was?"

"A. No."

3649 He was referring to this lawsuit that we are now discussing.

"Q. But there was a decision, as you testified, to put in an answer?"

"A. That is my best recollection.

"Q. And do you recall having told your counsel to put in an answer?"

3650 I don't know exactly what the old gentleman meant by that. He first says, in answer to a question:

"Q. And do you recall having told your counsel to put in an answer?"

"A. I don't recall telling him, but my best recollection is that we did."

Then the next question is:

"Q. Do you recall what you may have told him to say in the answer?"

"A. No."

So the Government picks out an exhibit which contained some statements which relate to the answer, and says that it has complied with this rule by merely having shown the Court that someone in the Certain-teed Company knew some of those facts, when that same individual testified in this case that he didn't know what, if anything, he told his counsel.

Now I wish to call to the Court's attention my own position in this case with respect to this client, as I have pointed out to this Court on other and numerous occasions. We have had a complete change in the management of Certain-teed since 1936, and I think that fact is important when the Government tries to bind us by an admission made by a previous administration, if it were an admission. I think we are entitled to have all the rules of evidence carefully complied with.

3651 Now your Honors may have noticed that from time to time during this trial I have been forced to take positions with respect to matters of evidence, which may have seemed to be going quite a ways in being tech-

nical, but that is because of my unusual position with respect to the change in ownership, control and administration of this business.

Now in this case we have an attempt here to foist upon us an admission made in 1928, if it was an admission. What I say is that there is no evidence at all that the facts which are pleaded in the answer, except in a very vague way, were ever known to the client, and as far as the record shows, were never communicated by the client to counsel, and which counsel may have gotten from any source and which, so far as this record is concerned, were not in the answer at the instructions of the client.

That last seems to me to be the most important fact because if you are going to bind a client, and this is on the agency theory, it seems to me that you ought to have more than this to show that the agent was acting within the scope of his authority.

There is another phase of the matter which I think I should call to your attention. As I look at these paragraphs of the answer, they seem to me to constitute conclusions of law by the pleader. They are arguments of law as to the legal effect of the license agreements and the position which the parties find themselves in under 3652 the license agreement, and it seems to me —

Justice STEPHENS (interposing). Do you think you could get the gentleman that drew that answer to concede that?

Mr. ADAMS. I think I could get him to concede that, all right.

Mr. BROMLEY. I had nothing to do with it. (Laughter.)

Mr. ADAMS. As a matter of fact, I think that should be stated.

But I believe that the paragraphs of this answer are nothing more than arguments of law in an equity suit where it was proper pleading to plead in that way. Naturally counsel wanted to take advantage of whatever arguments of law they could make, and they did so. But in so far as saying that this argument of law is something which is binding upon Certain-teed as an admission, it seems to me that in the state of this record we are going a very, very long ways.

I don't know whether I should take the time of your Honors to go over this in full, but I would call to your attention that paragraph 29, for example, says:

"This defendant further alleges, on information and belief, that the complainant has unlawfully sought to dom-

inate and monopolize the wallboard industry, in substantial restraint of trade, and in violation of said final decree entered June 3, 1923, and of the Anti-Trust Laws of the

United States, not only by controlling prices under 3653 its license agreements or otherwise, but also by granting rebates to customers and by other unfair practices, in violation of the Federal Trade Commission Act of the United States," and so on and so on.

It seems to me that that is nothing more nor less than an able presentation of a legal argument which was properly found in an equity suit. I don't think we ought to be bound by it in any sense as expressly or impliedly constituting an admission on our part.

I have cited in our brief, under Point II, some cases generally on this proposition.

In particular there is one of them there where the question had not to do with a pleading, but rather with testimony which was given by a witness in a lawsuit. That is *Sturm v. Boker* (1893), 150 U. S. 312, at pages 335-337.

The Supreme Court said:

"What the complainant said in his testimony was a statement of opinion upon a question of law. Where the facts are equally well known to both parties, such statements of opinion do not operate as an estoppel. If he had said in express terms that by the contract he was responsible for the loss, it would have been, under the cases, an opinion as to the law of contract, and not a declaration or admission of fact which would estop him from subsequently taking a different position."

3654. It seems to me that that is all that this can be said to constitute as far as this case is concerned.

That is all I have to say on this point, your Honor.

I have, as you know, filed a brief some time ago, or rather the Government filed a brief some time ago, on Exhibit 233.

Justice STEPHENS. That is the Redfield matter?

Mr. ADAMS. That is right.

Justice STEPHENS. We will dispose of them separately, and have all the argument on this topic at the one point in the record.

Proceed, Mr. Steffen.

Mr. STEFFEN. I propose to make a very brief argument, your Honor.

It seems to me, in looking over the brief or memorandum submitted by Mr. Adams, that he goes back for his



authorities to some rather early cases, such as Combs v. Hodge, which is a Supreme Court case, and the Diebold Safe Company case, and that those cases did assert, as one ground of their decision, that pleadings not signed or verified by the client, would not be admitted in evidence as admissions.

Those are very old cases, they have been repeated in a number of decisions, but there has been no very careful analysis, as I have found, in the decisions, of the reasons why they might be good law. On the contrary, I think I can say that those cases are, for the most part, dictum, and on a very limited set of facts, and that it is generally recognized that whenever there is anything to show the authority of the attorney, or anything to show—which is the simpler way—that he was acquainted with the facts of the matter concerning which he pleads by the complaint, that those matters which are put in the pleadings are admissible on the same basis as any other admissions.

That is to say, an attorney in signing a pleading is no different than an officer of the corporation. They are both agents in a sense, and they can both be authorized in the same way.

The older cases had to do with an individual client, and there might be greater sanctity in having an individual client sign the agreement. This case came up in a more modern situation, where you have a corporation, the Certain-teed Products Corporation, and when they engage counsel, as your Honors know full well, counsel are perhaps better conversant with many of the facts involved than are the officers of the company. It would be more or less waste motion to ask an officer of the company to sign in order to make the papers binding upon the corporation. The officers of the corporation engage counsel, competent counsel, and ask them to prepare their pleadings, and they prepare their pleadings, the facts are laid before counsel, and it seems to me that in this day and age a statement by counsel appearing in pleadings as to facts, must constitute an authorized admission on the part of the client.

That is the position which I think Mr. Wigmore would sustain, that we have moved on from the day of Combs v. Hodge.

That takes us to the question of what authority was given to counsel in this case. Mr. Adams has made a point that Mr. George M. Brown on the stand was unable to remember just what he told counsel.

Referring to page 2762 of the transcript—I think Mr. Adams referred to that—I asked the question:

“Q. And do you recall having told your counsel to put in an answer?”

“A. I don’t recall telling him, but my best recollection is that we did.”

“Q. Do you recall what you may have told him to say in the answer?”

“A. No.”

He didn’t recall what he had told counsel to put in the answer, but he did very clearly recall that there was to be an answer filed, and there was an answer filed, which I take it is a direct engaging of counsel to put in an answer in this case.

And while Mr. Brown may have been unable on the stand here to recall what he instructed be put in the answer, the fact that he instructed counsel to put in an answer is the significant thing.

I think that Mr. Brown—I defer to your Honors’ judgment on this—was unable to remember much of anything that took place. We had him on the stand all morning, and he couldn’t tell us what took place in his meetings with Mr. Avery on March 1st or February 28th. He was there for two or three hours with Mr. Avery on an afternoon, and two or three hours the next morning, and he couldn’t remember anything excepting that nothing came of it.

Then he gets back to New York, and he writes our Exhibit 212 which is his own memorandum, and in Exhibit 212 he outlines exactly, as we see it, what was subsequently put in the answer by counsel for Certain-teed.

He says, “We must put in an answer”; “We must assert that USG is mainly interested in domination and not interested primarily in royalties”—and while it may not be an exact paraphrase of the answer, as we have said in the memorandum, a comparison indicates that the matters placed in the pleadings are substantially identical with the position which Mr. Brown stated should be taken by his company, and the fact that he doesn’t remember it on the stand I think is a circumstance to be considered, but is not controlling at all.

Now we have cited, in our brief under Point II, some of the rulings which have held that where counsel is given access to facts by a client, and could, in fact, only get those facts from his acquaintance with the

client's business, that that constitutes a sufficient showing of a submission to the attorney of the facts, and an authorization to prepare what is necessary by way of an answer.

As to those cases that I refer to, the leading one, probably, in the State court, is *Johnson v. Russell*—an old case—(1887) 144 Mass., 409.

That case, though, I might point out, was referred to by the Court in the *Redfield* case, and was regarded as stating a sound proposition for purposes of the Federal courts, that where counsel are given access to information concerning the nature of the case, and they put in an answer in accordance with that, that that constitutes an admission on the part of the client as respects the matters pleaded.

Now we have a third point here, which I think ought to be considered rather carefully by the Court.

On page 9 of the memorandum we set out what the rules of procedure, or rules of practice were, obtaining in the equity courts in 1928, when this pleading was filed, and it there states that where counsel—and I might point out that verification was waived in the complaint, verification by the client—it there states that where counsel signs a pleading, as was done in this case, that that constitutes a certificate on his part "that he has read the pleading, so signed 3659 by him; and that upon the instruction laid before him regarding the case, there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

Now we take a rather serious view of that. It seems that when counsel signs his name to a pleading under a rule of court of this character, that he makes a representation, or makes a statement that he has received instructions, that his pleadings are in accordance with those instructions, that there is nothing in there that is intended to be scandalous or for the purposes of constituting delay.

In this case, it was Mr. Bromley's firm, although as Mr. Bromley stated he had nothing to do with the case, and I don't think the Court should lightly assume that that firm put in an answer on facts which were purely fabricated.

Justice GARRETT. Would it make the slightest difference, as a matter of law, as to whether it was the same firm that was then representing the client?

Mr. STEFFEN. No, your Honor.

Justice GARRETT. It wouldn't make the slightest difference as a matter of law?

Mr. STEFFEN. No, we are just bringing that out in order to embarrass Mr. Bromley, for fun, if we may. (Laughter.) It was Mr. Bromley's firm, but that has no bearing on the case.

Justice JACKSON. We used to say, when I practiced law in New York, that that firm was so big it was 3660 a law factory. (Laughter.)

Mr. STEFFEN. I may say that it is a very trustworthy firm —

Justice JACKSON (interposing). There is none better.

Mr. STEFFEN. And when they signed a pleading, as they did in this case, and when they certified that they did receive instructions from their client, I submit that they meant what they said, and there has been no showing by Mr. Adams that these pleadings were not authorized, and that they were ever disavowed. They went ahead for over a year and Mr. Brown finally settled it by signing the license agreement. So there seems to me there is almost nothing to Mr. Adams' argument.

As to conclusions of law, this is a court in equity, and when it examines the exhibit, if there are any improper conclusions in there, I think the Court can be trusted to give due weight to that fact.

Justice STEPHENS. Do you wish to comment, Mr. Steffen, upon Mr. Adams' statement with respect to the reference on page 2 of your brief to his alleged admission?

Mr. STEFFEN. That may have been error. We have checked the record this morning right here. It was our assumption, on reading it, that Mr. Adams in making his statement certainly recognized that members of the Cravath firm were present during the conferences. Exhibit 3661. 210, which was referred to, recited that lawyers were present. Also I recall, although I haven't yet put my finger on it, that C. O. Brown told us that he thought it was prepared by counsel, or someone said he thought it was prepared by counsel.

Our evidence is not very good on that, as you can see.

I didn't mention Exhibit 211, which I think is further make-weight argument, but it indicates that the Cravath, De Gersdorff firm was in communication with Certain-teed during this period, and concerning these matters.

Justice STEPHENS. Do you mean Exhibit 211 or 210?

Mr. STEFFEN. I mean Exhibit 211, which is still another exhibit.

Justice STEPHENS. Do you wish to reply?



Mr. ADAMS. Your Honor, I see in Mr. Steffen's argument what seems to me a fundamental weakness.

His cases, I think, where they have allowed these pleadings as admissions, where they are unverified, rely very heavily on the proposition that counsel could only get these facts from the client and that therefore, by some inference, the client is bound.

Well, that certainly couldn't be true in this case. Counsel could have certainly gotten all the facts that are in this answer practically out of Moody's or Standard Statistics or any place like that.

3662 The second thing is that, as the cases show, it must be shown that counsel was given access to these facts by the client, and the record is absolutely sound on that point. There is no showing of any kind that Certain-teed ever made any facts, with reference to this lawsuit, available to the Cravath firm, or to Winston, Strawn & Shaw, of Chicago, their other counsel.

I think it should be brought out here, since there is such a wholesale delivery of orchids to the Cravath firm, that we also had lawyers in Chicago.

Justice JACKSON. Was that Silas Strawn?

Mr. ADAMS. Yes.

Justice JACKSON. We will give him an orchid, too. (Laughter.)

Mr. ADAMS. I agree with all the kind things that have been said about these eminent lawyers, but it doesn't seem that that helps any.

There is an old equity rule about the certificate of counsel amounting to nothing more or less than a certificate that he had been retained in the case, and in New York practice it is called an affidavit of merit, indicating that the lawyer thought it was a meritorious defense.

But that is a very far cry from saying that the client placed him in possession of specific facts contained in a pleading, and authorized him to plead them in that way.

The last thing I have to say is that Mr. Steffen  
3663 says that there is no showing that the statements contained in this pleading were ever disavowed. It seems to me they were disavowed in a very practical way. The Certain-teed Products Corporation settled the lawsuit and took a license, and I think it is important that this Court should recall that this is not a case which went to litigation and was tried, but this is a pleading which was put in at an early stage in the case, a case which was later settled, constituting an admission or disavowal, if

you want to put it that way, of the position taken in the answer.

Justice STEPHENS. We will take the morning recess at this time.

(Thereupon, a short recess was taken, after which the trial was resumed.)

Justice STEPHENS. Mr. Adams, on the second point—or is this the Government's motion on the second point?

Mr. STEFFEN. Yes, your Honor, it is.

Justice STEPHENS. Will you refresh me on it, briefly?

Mr. ADAMS. Exhibit 233 was offered in evidence as a memorandum of Redfield, a lawyer for Certain-teed. It was excluded from evidence.

Justice STEPHENS. And the Government is asking to reoffer it?

Mr. ADAMS. Yes.

3664 Justice STEPHENS. Then we will give the Government the opening in this matter.

Mr. STEFFEN. May it please the Court, this is a reoffer of Government's Exhibit No. 233 which, as you will recall, was a memorandum written by Mr. Redfield who is connected with patent counsel for the Certain-teed Products Corporation, and it was duly identified by Mr. Redfield when it was presented here, and the question was raised at the time as to whether or not the memorandum was privileged, and the grounds upon which your Honor excluded the evidence are stated at page 2890 of the transcript, and they included the ground that it was privileged and that the privilege had never been waived.

I call your attention to page 2 of the Government's brief, where Justice Stephens makes the following statement:

Justice STEPHENS. The Court has examined the offered document, proposed Exhibit No. 233, during the recess, and given consideration to the authorities and the contentions of counsel. The Court is of the view that on the record the document is privileged, and that there was no waiver; that there was a claim of privilege by Mr. Redfield in the Grand Jury proceedings, and that there is no showing before the Court that he was authorized to waive the privilege thereafter; and that identification of a document does not constitute a waiver."

In order to establish waiver it was necessary, of course, for the Government to introduce the telephone conversation between Mr. Redfield, on the one hand, and Mr.  
3665 Dowd, who was a representative of Certain-teed Products Corporation, and at the time that that

conversation was offered, we asked Mr. Adams whether Mr. Dowd was an officer of the corporation.

We have set out on page 2 of the memorandum the colloquy which resulted, as follows:

"Mr. KNUFF. Mr. Adams, will you admit that Mr. Dowd was an officer of the corporation at that time?

"Mr. ADAMS. He was not.

"Mr. KNUFF. He was not an officer of the corporation?

"Mr. ADAMS. No.

"Mr. KNUFF. What was his position with the corporation?

"The WITNESS. I don't know.

"Mr. KNUFF. I meant that for Mr. Adams.

"Mr. ADAMS. I think that at that time he was comptroller, he was not an officer. That is not an officer. That is not an officer of the corporation, it is merely a title of the man who heads up the accounting department."

And of course when it appeared, as it did then, that Mr. Dowd was not an officer, and apparently therefore not one who would be authorized to waive the attorney-client privilege, we proceeded no further, practically, except to get the evidence in concerning the conversation, for the purposes of making a reoffer later.

After that, we proceeded to find out whether Mr. Dowd was or was not an officer, and we have checked correspondence which appears as an appendix to the brief. We also went to the Securities and Exchange Commission and the Securities and Exchange Commission's files showed that he was reported as an officer; and of course Moody's shows him to be an officer; and Mr. Adams now admits that he was an officer during the time when this conversation took place, that is in June, 1940.

Now I take it, therefore, that it is an established fact that Mr. Dowd was an officer. He was the vice president and comptroller, and the correspondence which we have had with Mr. Dowd establishes that he was in charge of the matter of supplying documents under the subpoena which the Government had served some weeks before.

There is a series of letters between the Government and Mr. Dowd indicating various discussions concerning the compliance with the subpoena.

Justice STEPHENS. Is that without dispute?

Mr. STEFFEN. I have the record here.

Mr. ADAMS. Yes, there is no question about that, your Honor. I may say, your Honor, that when I made that statement I knew that Mr. Dowd had been originally the

comptroller of the company, and I knew that he later had become an officer and director; it was my understanding that he had become an officer and director at the same time, that is, sometime in 1941. I know Mr. Dowd, and I knew about his promotion, and I thought that he had  
 3667 come up to be an officer at the same time that they made him a director. That is why I made the statement to the Court.

I find now, since I have checked it up, that actually he had become a vice president in March, about three months before this incident took place, that is to say, in March of 1940.

So when I made that statement to the Court I was relying on a recollection which it turns out was wrong.

Justice STEPHENS. Well, is it without dispute that he was the officer in charge of responding to the subpoenas issued by the Government for the production of documents?

Mr. ADAMS. As to that, I am not prepared to say. I am certainly prepared to admit that he wrote the letters to which Mr. Steffen refers.

Justice STEPHENS. I see.

Mr. STEFFEN. Having established that Mr. Dowd was an officer at the time, and in charge of the matter of supplying documents, or apparently in charge of the matter of supplying documents under the subpoena, the next question becomes one of whether or not there was an actual waiver by Mr. Dowd of the attorney-client privilege.

That turns on the conversation that Mr. Redfield and Mr. Kelleher had with Mr. Dowd.

As it appears from the evidence, when Mr. Redfield was called upon to identify or to testify concerning  
 3668 Government's Exhibit No. 233, he raised the question informally that that was a privileged document. Mr. Kelleher then said, "If that is privileged, let's see whether we may or may not introduce it." And between the two, Mr. Kelleher and Mr. Redfield, they proceeded to call up Certain-teed in New York.

Now I think we must get those facts clear. Mr. Adams, in his memorandum at page 11, says:

"In this case no such proof exists and, in fact, the contrary was shown. Thus Mr. Redfield testified as follows:

"Q. And whom did you ask for when you called the Certain-teed office in New York?

"A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for."



Now Mr. Adams states that as being all the evidence that there is in this very brief record to show how that conversation took place, and that is also false.

I will read you from page 2880 of the testimony where the question was asked:

"Q. And did you later contact any official of Certain-teed Products Corporation as to whether or not they would waive that privilege?

"A. That is a little difficult to answer categorically. I spoke to the Assistant Federal Attorney and told him that it was my feeling that there was a privilege 3669 here and that I was in no position to waive it, but that I should assert it and, together (note the word "together") we called Certain-teed in New York."

Now that is a far cry from the short excerpt that Mr. Adams would have this Court rely upon as being all that transpired when they called the office of Certain-teed.

Now, look at page 2882, also, at the bottom of the page. Mr. Adams is questioning the witness:

"Mr. ADAMS. And you had no way of identifying that person as being Mr. Dowd, had you?

"The WITNESS. Not other than the fact that both the United States Attorney and myself called Certain-teed and this man answered, who we both believed was Mr. Dowd and who represented himself as such on the telephone."

Those are statements that are unchallenged in the transcript, and they indicate that both Mr. Redfield and Mr. Kelleher called up Certain-teed; that a man answered, who said he was Dowd; and that then the conversation occurred which constitutes the waiver.

Now if you will look at page 8 of Mr. Adams' brief, he insinuates that there wasn't any waiver. At page 8 he says:

"The statement attributed to Mr. Dowd by the witness Redfield before the Grand Jury was limited to permission to identify the documents. It is most significant that 3670 the Government in its memorandum fails to state this controlling fact to the Court."

Well, let's read about that. From page 2886 and 2887 of the transcript let us find out what the witness said:

"Q. And what did they tell you to do, the New York office of Certain-teed?

"A. I explained what I have just explained to you, and asked what they wanted me to do, and it is my recollection that Mr. Dowd said, "Well, I don't know, we have nothing to hide, we have thrown our records open to the Department

of Justice, and so far as I can tell there is no reason that you should not testify."

That goes much beyond the excerpt which Mr. Adams put in his brief, and which he would ask this Court to rely upon as being all that transpired by way of waiver.

The fact is that Mr. Kelleher and Mr. Redfield together called up Certain-teed, got Mr. Dowd on the phone, stated the situation to Mr. Dowd, and Mr. Dowd then made this statement, "Well, I don't know, we have nothing to hide \* \* \* so far as I can tell there is no reason that you should not testify."

Justice JACKSON. What is that page?

Mr. STEFFEN. That is from pages 2886 and 2887.

That, we consider, is a complete waiver. The waiver occurred right then.

Now let's see whether they understood it the way that wording would imply that they did. They then  
3671 proceeded to go in to the grand jury, as Mr. Redfield testified, and we have shown you the grand jury minutes. He then was shown Government's Exhibit No. 233 and he identified it. The exhibit was given a grand jury number and it became evidence upon which the grand jury was then entitled to rely in determining whether or not to vote an indictment.

There is no requirement, in the case of a grand jury, for the item to be offered in evidence; there is nobody to receive it; you simply present it to the grand jury, it is duly identified, it is a very serious and solemn proceeding, and when the grand jury is offered evidence, the Government's attorney must use every care to see that the evidence that the grand jury may act upon is evidence which subsequently could be used to sustain the charges made in the indictment.

In this case, they very carefully procured a waiver from the Certain-teed Products Corporation, and they then proceeded to place it before the grand jury; the grand jury could and did apparently rely upon it as evidence upon which it could vote a true bill.

It seems to me that the matter of waiver is completely established in the case. I think your Honor's statement that identification of a document by counsel is not in itself a waiver, is perfectly correct in the situation which we have before us.

3672 Identification before a law court is simply identification of a paper. There is no testimony required and it is not evidence. But when you present it before a

grand jury, the matter becomes, then, evidence upon which the grand jury can act.

The cases which Mr. Adams has cited upon telephone conversations do not sustain his position so far as I can ascertain. We have cited a series of cases where it appears that the person calling a business house, who does not know the name of the person who answers, or is not acquainted with him and does not know his voice, but if, in fact, you have called the business house, and if in fact you got, as is apparent in this case, someone who is quite familiar with the matter in question, judging by the answer made, those are circumstantial matters which completely identify or are deemed to identify the speaker as being the man whose name he claims to have—and in this case that would be Mr. Dowd.

There are no cases cited in Mr. Adams' brief which recite anything to the contrary. The closest one, as far as I can make out, is the case of *Smithers v. Light*, over on page 12 of the brief, which is a Pennsylvania case, and I can take up those facts briefly.

The broker in that case received a telephone call from somebody who said his name was Light, telling the broker to sell certain stock. An hour later that same company called up and said to sell it at a different price, and 3673 the broker thereafter sold the stock.

Now as the transaction stood, at that point they didn't know who Light was.

That is the reverse of this transaction. In this case we were calling up and asking for Certain-teed, and getting a man who said his name was Dowd, who was a representative of Certain-teed, and when the conversation starts that way, the cases recognize that that is circumstantial identification of Dowd, but that when the conversation starts the other way, the man calling up is not circumstantially identified.

There was a third conversation in this *Smithers v. Light* case, where a clerk in the afternoon of that day called up Mr. Light, or somebody at that number, and Light got on the phone, presumably. The clerk then wished to give a notification to him that they had sold the stock. The witness thereafter went on the phone and talked to whoever was on the phone, and the question was whether or not he could testify that he had talked with Light.

The Court, in a rather close decision, said that he might not, that Light had not been circumstantially identified

because he didn't place the call, that is because the witness didn't place the call, and that somebody else, some clerk, had placed the call, and it was left open as to whether he had properly called Light or somebody else.

3674 In this case the testimony is perfectly clear that Mr. Redfield and Mr. Kelleher together called up Certain-teed, so that there is no question about the matter. I can say that the way that is usually handled is that the attorney, in this case Mr. Redfield, will say to the United States Attorney, Mr. Kelleher, "I think this is privileged"; and they will say, "Well, let's call up" and they will go into an office and one or the other will call up. They can't both talk at the same time, and probably Mr. Kelleher would do it because it was probably at Government expense. They will say, "We will get Certain-teed." Then the phone will be turned over right there to Mr. Redfield. The conversation goes on and, as Mr. Redfield said, "We both understood it was Mr. Dowd, and both believed it was Dowd."

So that as far as we can see, on the matter of privilege, which is the matter which we are discussing here, the privilege was completely waived and we would say that it was waived at the time of the conversation. The subsequent actions in placing the evidence before the grand jury are corroboration of that waiver.

Now on the point of whether or not this is the first occasion upon which a waiver could be asserted, I think the facts display to the contrary.

Justice STEPHENS. You mean that this is the first occasion on which the claim of privilege could be asserted?

3675 Mr. STEFFEN. Yes, your Honor,—for the reason that the claim of privilege was clearly and carefully brought to the attention of the officers of Certain-teed at a point of time when that evidence could have been refused. In other words, they had a very clear-cut and well-presented opportunity to say, "We wish to claim our privilege," at that time.

Mr. Redfield knew, certainly, that if it was going to go before the grand jury, that it would become evidence. So it seems to me that they then had their opportunity.

I want to say further, on that score, that it is always open to a person who has documents subpoenaed, to move to quash the subpoena. You have an opportunity, earlier than the subsequent trial, to assert the claim of privilege, and at that time they had a definite opportunity to assert



their claim of privilege, and refused to do so. On the contrary, they said, "We waive our privilege", or words to that effect.

Mr. Knuff points out that Mr. Kelleher is in the South Pacific, and of course we are unable to call him.

Mr. ADAMS. If the Court please, it seems to me that one very important thing that I should state at the outset, and which the cases indicate is of importance, is that we assert here, as I have stated earlier, that we are in a position to prove, through Mr. Dowd, we believe, that Mr. Dowd never had any such telephone conversation.

3676 Justice STEPHENS. Will you repeat that, please?

Mr. ADAMS. I say that we regard it of importance here that we assert, as I stated when we originally raised this point, that we can produce Mr. Dowd to testify that he never had any such telephone conversation.

Justice STEPHENS. Do I understand that you are asking now to produce him to testify to that effect?

Mr. ADAMS. No. I mentioned that only because it seems to me that it is important in considering this question.

This is not a question where we are merely trying to prevent this document from going in evidence on a technical rule of law. We have a position here of substance. As to whether or not this Court thinks it is necessary, or will think when we get through with this argument, to call Mr. Dowd on this point, I will defer consideration of that.

But I want to make it clear at the outset here, as I have tried to previously, that as far as we are concerned, we believe that Mr. Redfield was mistaken —

Justice JACKSON (interposing). Well, do you think that privilege was claimed by Certain-teed?

Mr. ADAMS. I do.

Justice JACKSON. Where?

Mr. ADAMS. I will answer that in this way. Before I answer that, if I may, your Honor, I should like to have an opportunity to see the grand jury minutes again.

3677 (Thereupon, a copy of the grand jury minutes in question were handed to Mr. Adams by Government counsel.)

3678 Justice JACKSON. Mr. Adams, if, in fact, it were Mr. Dowd who spoke over the telephone from New York, would your situation be different?

Mr. ADAMS. I really don't think so, under the circumstances of this case. I think I can bring that out.

Justice JACKSON. Well, it was just an inquiry. I was

wondering as to that, if in fact he had talked over the telephone.

Mr. ADAMS. Getting back to that phase of the argument, the Government, it seems to me, as Justice Stephens pointed out when we argued this before, has rather confused these two things: First, we have to see whether or not, on a fair construction of what happened in the Grand Jury, whether what happened in the Grand Jury constitutes a waiver. I don't think there can be any question but that the mere fact that a witness is asked to identify a document does not constitute a waiver. That is all he was asked to do, and that is all that he did. There is no question about that. The cases are perfectly clear that identification of a document does not constitute a waiver. There are any number of them cited in the brief.

Then you come to this question—Well, now, what was he authorized to do? The question of authorization, I say at the outset, has nothing to do with it, and I say for that reason that whether he was an officer or wasn't an officer 3679 has nothing to do with it. The question before us here is what actually happened. Was that document divested of its confidential character by any act of Certain-  
teed? It seems to me perfectly clear that it was not.

Justice JACKSON. Aren't you taking the wrong way around? Was the claim of privilege ever asserted by Certain-teed, after it was delivered in response to a subpoena that turned it over to the Government?

Mr. ADAMS. The claim of privilege was asserted by Certain-teed at the first time it could assert it, which is here in this court room.

Justice STEPHENS. Couldn't it have asserted it by moving to quash the subpoena, going before a United States District Judge at the time of the Grand Jury proceeding and objecting to having that document put in before the Grand Jury?

Mr. ADAMS. I suppose I can answer that by saying that it could have, but we had no reason to believe that this case was ever going to be tried, for that matter. We could have asserted it, I have no doubt, at some earlier time.

Justice STEPHENS. I don't see the force of that. If the waiver of a privilege or the failure to assert a privilege is conditioned upon the client's pre-vision as to whether, at some time later, it would have been valuable to him to claim the privilege, there would be no way of ever determining the question of privilege. I thought the law

3680 was that in order to claim a privilege, since one must respond to a subpoena unless the subpoena duces tecum is quashed in some manner, he must assert the privilege at the first reasonable opportunity or else be taken to have waived it.

Mr. ADAMS. Well, it seems to me that under the facts in this case, this is the first reasonable opportunity, because you want to consider that what Mr. Dowd—if there was any such conversation—was asked was whether or not he would permit the witness to identify the documents, and he said that that is what he would do.

Mr. Steffen has suggested that we haven't put the whole conversation, which took place in this court room, in the brief. As a matter of fact, we did set the whole thing out. And I say that the conversation before the Grand Jury, to which the Government made no reference, read in the light of the statements in this Court, boils down to this; that the witness was authorized to identify the document, that that is not, and could not be by any stretch of the imagination, a waiver of the privilege; that before the Grand Jury he was told he could identify the document, and that he did so.

Justice JACKSON. Then it was before the Grand Jury, was it?

Mr. ADAMS. Yes. But the client had not authorized him to waive any privilege, the client had simply authorized him —

3681 Justice JACKSON (interposing). The client didn't claim any privilege, that is the thing I am getting at. When was the claim made, not whether they waived it particularly? You waive it if you don't claim it.

Mr. ADAMS. It seems to me that the answer to that would be this: They call up and say, "Are you willing to waive this privilege?"

He answers by saying, "We are willing to have you identify the document." In other words, we are willing to have you go that far, but no further. Therefore, we waive nothing further.

Mr. STEFFEN. I insist Mr. Adams stay with the record. The witness stated here that he was told he could testify regarding the document, not merely identify it.

Mr. ADAMS. He was asked this —

Mr. STEFFEN (interposing). I am talking about the testimony before the Court.

Mr. ADAMS. I am talking about it, too. He said that before the Grand Jury he was told he could identify the document.

Now as far as Judge Jackson's question is concerned, the client was asked, "Will you waive the privilege?"

He said, "You can identify the document." In other words, we reserve whatever rights we have.

3682 In this court room it seems his testimony was entirely consistent with that. Testifying 3½ years later, he testified that he called up and asked what they wanted him to do, that is to say, identify the documents. That is as he testified before the Grand Jury. Then he said: "Mr. Dowd said, 'Well, I don't know, we have nothing to hide, we have thrown our records open to the Department of Justice, and so far as I can tell there is no reason that you should not testify.'"

And then Mr. Knuff said, consistent with the Grand Jury position:

"Q. And did you identify the document?"

And the answer was:

"A. Yes."

In other words, his testimony here is entirely consistent with his testimony before the Grand Jury, that all he was ever authorized to do was to identify the document. To that extent the waiver of the privilege never became operative, there never was any waiver of the privilege. We were asked, "Will you waive?" We said, "You can identify". "Identify," under the cases, is clearly not a waiver. Therefore, we have not waived.

Now that is my position on that point. I don't know whether I have made it clear.

Justice JACKSON. You have

3683 Mr. ADAMS. Now on this question of the telephone call, I want to repeat that we have taken the position that there never was any such telephone call as far as Mr. Dowd was concerned.

Now we get to —

Justice STEPHENS (interposing). Before you go to that question, clear up one other point. It seems to me that it is something more than a matter of words, whether we talk in terms of waiver or claim. Of course, a privilege once acquired exists until it is waived.

But one of the rules is, as I understand it, that when you are called upon to produce a document, you do waive the privilege unless you claim it at the first reasonable opportunity. When was the privilege claimed here?

You say the first opportunity to claim privilege was before this Court. That seems a strange position, Mr. Adams.



Certainly there must be some way in which a person who is served with a subpoena duces tecum in a Grand Jury proceeding can protect himself against having a confidential document disclosed before awaiting some theoretical trial which may follow years after a Grand Jury proceeding. Why can't the person who is the subject of a subpoena go before the United States District Judge who issued the subpoena and claim that this document is privileged and therefore he is not obliged to produce it?

3684 Mr. ADAMS. It seems to me that the complete answer to Your Honor on that phase of it is that Mr. Redfield did claim the privilege.

Justice STEPHENS. That doesn't seem to me to be an answer to my question, because my question is: How do you justify your position that this Court is the first time they ever had a chance to claim privilege?

Mr. ADAMS. Maybe I am wrong about that, and I ought to say that we have —

Justice STEPHENS (interposing). Whether they did claim it down there is another question, but I understand your contention is that he couldn't waive it down there under any circumstances because this Court is the first chance he had a right to claim it.

Mr. ADAMS. Maybe I should state that this way,—that we are continuing to claim the privilege. Mr. Redfield claimed it, there is no question about that. Mr. Redfield was not authorized to waive it, and he didn't waive it. Nothing he said in the Grand Jury waived it. He merely identified the document, which the Government agrees does not constitute a waiver.

Justice STEPHENS. Thank you, I see your point.

Now proceed to the next topic, about the telephone conversation.

3685 Mr. ADAMS. The telephone conversation—we are discussing here the question of the so-called business house rule. That rule has developed, as I understand it, as the modern business methods have included a wider use of the telephone. But the fundamental rule still remains which was introduced by the courts at the time the telephone began to be used for business; and that is that you have to have identification of the voice.

Now the question here, when you apply the business telephone rule, is this: If you call up a business house and someone answers the phone, that is a common occurrence, and it is said to be reasonable to suppose that you got the man that you wanted to talk to.

But that is an extension of the ordinary rule requiring identification of the voice, and therefore the courts have very carefully protected that by saying: It is necessary that when you call up, when you want to prove a business telephone call, you show clearly and distinctly and unequivocally that the person who says he made the call actually made that call himself.

Now the cases have said, for example, that where a man in his office says to his stenographer, "Get me Jones, of the Smith Company, on the telephone", in the absence of the telephone records or proof of the 'phone operator, you can not introduce that telephone call, because there is an intervening agency there which is necessary to complete the chain of proof.

3686 Now in this case, there is no such evidence. Mr. Steffen points out that on a couple of occasions the witness said that "together we called up Certain-teed", but the only evidence in the case—and upon this I believe I can not be challenged—as to who actually made the telephone call, is the evidence which I quoted in my brief, as follows:

"Q. And whom did you ask for when you called the Certain-teed office in New York?

"A. I don't think I asked for anyone. I think the Assistant United States Attorney called. I don't know who he asked for."

Now there is no evidence, even, that it was Mr. Kelleher, in this record. It might have been any number of the men across the street there who were present. But it seems to me, in view of the fact that we so vigorously assert that Mr. Dowd did not talk on the telephone, that they have got to —

Justice JACKSON (interposing). Of course, that is not evidence. Are you going to bring Mr. Dowd down here, if necessary, to testify?

Mr. ADAMS. Yes.

Justice JACKSON. Then it will be a question —

Mr. ADAMS (interposing). Then it would be a question of fact. I don't think we need to go that far, Judge, because I said that on the state of this record, it is  
3687 perfectly clear that while he said they made the telephone call together, when you get down to the vital point of voice identification, which is what we are talking about here, someone other than the witness picked up the telephone and made a call to another point, the witness didn't do that. Someone else, an Assistant United

States Attorney, did that. Now the witness may have been in the room or he may not have been in the room.—

Justice STEPHENS (interposing). I don't understand that the Government is relying upon voice identification. There isn't any claim, is there, that either Mr. Kelleher or Mr. Redfield knew Mr. Dowd's voice? The contention is that they asked for Certain-teed and got a man who said he was Dowd, and it is now conceded that Dowd was an officer, and therefore there is circumstantial proof that they were talking with someone representing the company with authority to act.

That is your position, isn't it, Mr. Steffen?

Mr. STEFFEN. Yes, and the man who spoke was obviously familiar with the transaction.

Mr. ADAMS. When I speak of voice identification, Your Honor, I am speaking of this whole rule, and this call to a business house is merely an extension or a relaxation of the voice identification rule. It is in that sense that I 3688 referred to voice identification.

But the rule requires that in order to come within what you might call this exception to technical voice identification, you must show that the party wanting to introduce the conversation and testify to it actually himself made the call to the business-house, and you can't have proof that someone else did, as in this case. The proof is clear that no matter whether he said, at two or three places, "Together we made the call", the fact is, when you get down to actually showing who made the call, it was not made by Mr. Redfield but was made, according to his testimony: "I think the Assistant United States Attorney called. I don't know who he asked for."

Justice STEPHENS. Now the voice identification rule, as I understand it, isn't any different from an eye identification rule. A person seeking to rely upon a conversation with an alleged agent of a mercantile institution, of course, must show that he was talking with some authorized person. He might show that by saying that he had a conversation with him in which he saw him and recognized his features. He might show it by saying that he talked to him and recognized his voice, whether over the telephone or otherwise. Now the present rule is simply another form of identification, isn't it? It proceeds upon the theory that if a telephonic call is put in to a mercantile firm, and a 3689 voice responds, a person responds stating that he is with that firm, and giving a name, and appar-

ently being familiar with the subject matter of the conversation, that is taken as evidence that one is talking to some representative of that firm. What difference does it make—I don't see the point of your fine distinction—what difference does it make whether the call is put in by A or by A's stenographer or by A's cooperator, as it is asserted here?

Mr. ADAMS. I don't regard it in any sense as a fine distinction, Judge.

Justice STEPHENS. That is what I am trying to understand. What is the distinction?

Mr. ADAMS. It seems to me that it is important because of the widespread opportunities for fraud if you relax this rule—not that I am suggesting any fraud here—but because of the widespread opportunity at least for misunderstanding, as undoubtedly occurred here.

Justice JACKSON. You might extend that to the telephone exchange girl, mightn't you? She might ring the wrong number.

Mr. ADAMS. The cases are perfectly clear on that, Your Honor, that in order —

Justice STEPHENS (interposing). Suppose I pick up a telephone and call up a mercantile institution, and that institution responds and some person purporting to represent it talks to me. That is what, as I understand it, Wigmore talks of under this new rule of telephonic circumstantial identification. Suppose I tell my secretary to do that in my presence, is it any less worthwhile, circumstantially?

Mr. ADAMS. It seems to be perfectly clear—and I think the cases are perfectly sound in holding —

Justice STEPHENS (interposing). What is the distinction?

Mr. ADAMS. The distinction is this, that when you call up on the telephone yourself, you put the number in, or dial it, and go through that operation of getting that company. When you tell someone else to do it, we have no proof, and you don't know, whether that other person actually did it.

Now let me read on that point —

Justice STEPHENS (interposing). Suppose the other person did it in one's presence? That is the contention here, that Mr. Kelleher and Mr. Redfield were acting together.

Mr. ADAMS. It could very easily be done in someone's presence and still a misunderstanding arise.

Just let me speculate a minute there, Your Honor. Sup-



pose, as may well have happened in this case, Mr. Kelleher gets on the phone and says to his operator, "Get me Certain-teed Products Corporation in New York." The call comes back, "I have Certain-teed Products Corporation on the phone."

3691 "Who is this?"

"This is an Assistant United States Attorney in Washington. We want to talk to somebody about waiving a privilege."

They explain in detail what they want.

The operator says, "Well, Mr. Dowd will be in charge of that." They say, "Wait a minute."

Dowd then turns out to be busy, or something else, and some entirely different person in the Certain-teed organization gets on the phone.

Kelleher, or whoever it might be, may think he is talking to Dowd, and he isn't talking to any such person.

Mr. STEFFEN. He says he is Dowd.

Mr. ADAMS. It may be of fundamental importance that we have evidence in this case by the person who actually did the telephoning and who got Dowd on the wire, to state that that is who it was.

Justice STEPHENS. Do you want to call Mr. Dowd down here to testify that he did not have that conversation?

Mr. ADAMS. If Your Honors think it is necessary.

Justice STEPHENS. It isn't for us to say whether it is necessary. You must make your own foundation for your motion, or for resisting the Government's motion, rather.

Mr. ADAMS. Well, it seems to me, according to the tenor of Your Honor's questions, that I am required to answer that I want to call Mr. Dowd.

3692 Justice STEPHENS. If you draw any conclusive inferences from what you call the tenor of our questions, you make quite a serious mistake. The only reason we ask questions is to give counsel the opportunity to resolve questions that come up in our mind. I don't know how in the world we are going to decide these questions. I can't forecast and speculate as to whether it will be necessary to call Mr. Dowd or not, and you are certainly not entitled to draw any inferences from my comments as to what my state of mind is on that particular point.

Mr. ADAMS. I didn't mean to suggest that, of course. What I meant to make as a point there was that the evidence was once excluded, and it was not necessary at that point to call Mr. Dowd. Now it may have been excluded,

as the Government believes, because of my error in stating to the Court what Mr. Dowd's position was. That may be true.

Now my position here is that the telephone call is not admissible, do you see? If the Court believes that on the state of the record the telephone call is admissible, that is what I meant to get at when I was asking my question.

Justice STEPHENS. Well, we can't rule on the thing piecemeal very well, Mr. Adams. I don't see how we can do that. We have to read these briefs and read these cases, and under your theory, then we have got to come back to the court room and announce how far we agree and how far we disagree on the ruling. It would seem to us better to get this whole matter before us at once. If you feel that it is an essential element in your case to prove that this conversation never occurred, and that Mr. Redfield and Mr. Kelleher were entirely mistaken, that they didn't have any such conversation, I suppose that is a preliminary question of fact which may bear upon the ultimate decision on this question.

Mr. ADAMS. The only reason I raised it here, Your Honor, was because, if the telephone call is admissible—and I don't want to suggest that Your Honors should rule at any time on that point except in your discretion—if it is admissible, obviously I think I should call Mr. Dowd to testify with respect to that telephone conversation.

Justice GARRETT. Mr. Adams, may I ask you—I don't have the record containing Mr. Redfield's testimony before me, and my recollection is a bit hazy; of course, it has been refreshed by the reading here this morning—but isn't it a fact that Mr. Redfield did testify that he talked, himself, with someone there who represented himself to be Dowd?

Mr. ADAMS. There is no question about that.

Justice GARRETT. And so the mere fact that Mr. Kelleher might have been the one who made the call, if Mr. Redfield actually talked with the man and if he was the proper person with whom to talk, what difference does it make who went through the mechanics of putting in the call for the man?

Mr. ADAMS. Answering your question, the first question, there is no question about it that Mr. Redfield testified that he did talk with someone who said he was Dowd. There is no question about that.

Answering the other portion of your question, it seems to me that it is still important that the fundamental require-

ment be complied with, that the person who wants to put in the conversation should testify that he made the telephone call.

Justice STEPHENS. I didn't mean to suggest by my statement, Mr. Adams, that we wish to put you to unnecessary trouble and expense in these busy days and days of difficult transportation. If we can reach a conclusion with respect to whether the telephone conversation is or is not admissible, perhaps we can find a way of announcing that so, if it is not necessary for you to call Mr. Dowd, you will not have to go to that trouble. Perhaps that can be arranged.

My point is that I don't want you, representing your client, to omit to put anything in here that you think may be necessary to your client's protection because of any speculative ideas you have as to how the Court is going to rule on the admissibility of a telephone conversation.

Mr. ADAMS. That is a responsibility that counsel has to assume, and I certainly do assume it, Your Honor. I don't want to suggest that I am trying to evade that. As far as Mr. Dowd is concerned, I assume that he is now in Chicago —

Justice STEPHENS. I will say very frankly to you that I was much influenced, in the decision which I, as far as I was personally concerned, reached on this point when it came up before, by the statement of yours, undenied by the opposite party, that Mr. Dowd was not an officer of the company and had no authority, in consequence, to make a waiver. But that has entirely a new light now. There was no contest on that point before, and we took your statement for it. The thing that is before us now is in an entirely different light.

Mr. ADAMS. I am very sorry that that error crept in.

Justice STEPHENS. I am not criticizing you at all. We all make those mistakes in the course of busy practice, I realize that.

But that was, it is only fair to say to you, one of the important grounds of my decision, and I think that is true with my colleagues.

Mr. ADAMS. I quite agree. It was important to me when I based my argument on it.

I don't know exactly how I should leave this with Your Honors. I assume that you will defer taking any steps today with respect to this point?

3696 Justice STEPHENS. We won't make any ruling today, because we want to read these briefs and these

cases much more carefully than we have been able to—two of them this morning are entirely new to us—and we want to consider it and have a conference on it. There is no other testimony hanging upon these rulings, so we would prefer not to do it in a rush, because it is important to both sides that we rule upon these matters soundly. We don't have very much time during the busy days of taking testimony to go into extensive case reading. There is so much of the record reading to do in the evening.

We will not put you at a disadvantage, however. If we reach a conclusion, Mr. Adams, that this telephone conversation is admissible, knowing that you do want to call Mr. Dowd in such event, we will not foreclose you an opportunity of doing that before a final ruling.

Mr. ADAMS. I appreciate that very much, and that was all that I was referring to earlier.

Justice STEPHENS. Thank you.

Mr. Steffen?

Mr. STEFFEN. I have another matter, if I may present it very briefly.

Justice STEPHENS. Do you want to reply to Mr. Adams?

Mr. STEFFEN. I don't think a reply is necessary,

Your Honor, other than to say that if it becomes 3697 important to have Mr. Dowd, we would suggest that he be put on as part of the defendants' case, at that time, rather than at this time.

Mr. ADAMS. Of course, in answer to that, I have no understanding that there will ever be a defendants' case.

Justice STEPHENS. Isn't that a preliminary question of fact bearing upon the Court's ruling on the admissibility of evidence which is being put on now?

Mr. STEFFEN. It could be done either way. We feel we have made a prima facie showing. If Your Honors agree with that, it would still be open to them, either now or at some later point, to put Mr. Dowd on. I think it would be more convenient, from the Government's standpoint, to go ahead with our regular case and not go into a collateral matter than can be put on properly on rebuttal.

Mr. ADAMS. I would like to make my position clear. I am sure the Court, on this one point of evidence, is not intending to put me in any position where I would be waiving any motion to dismiss at the end of the Government's case.

Justice STEPHENS. No.

Justice JACKSON. Of course not. It will be handled in



the usual way. When the Government is finished, then if the motion is denied you will call your witnesses.

Justice STEPHENS. But this is a different situation. Here we have evidence offered, and whether 3698 or not it is admissible depends upon a preliminary question of fact. It seems to us that that ought to be determined, at least it seems to me that that ought to be determined now, if it depends upon a question of fact. It is like offering a confession in evidence. You ought to hear voir dire testimony as to whether or not the confession was voluntary, and hear both sides of that testimony on the voir dire.

I should think, if we have to get into the question as to whether or not this conversation occurred, that we ought to hear from Mr. Dowd now, if he is going to testify, and not later.

Mr. STEFFEN. My other matter will take about four or five minutes, and I think I should call it to Your Honors' attention.

Justice STEPHENS. Just a moment, please.

Mr. BROMLEY. I wanted to be heard on this matter for just a moment, if I might, if Mr. Steffen does not wish to reply.

Justice STEPHENS. Which matter?

Mr. BROMLEY. Exhibit 233.

Justice STEPHENS. You may.

Mr. BROMLEY. Let me say first, although I do not care to inject myself into the argument, it seems to me I might be helpful if I called to the Court's attention the questions which some of you have asked with regard to 3699 waiving the privilege.

I think Mr. Adams' position is unsound where he says that this is the first time Certain-tee could assert the privilege. I think there have been at least three occasions on which that privilege could have been asserted. First, he could have moved to quash the subpoena on the ground that the documents called for were privileged. Second, he could have asserted it before the Grand Jury. And third, he can assert it now.

But does the fact that he failed to move to quash waive the privilege? It seems to me clearly it does not. Suppose the Government served USG today with a subpoena duces tecum calling for the production here of documents which were privileged. Would the fact that we did not immediately rush into court with a motion to quash deprive us of

our right to assert the privilege when the witness took the stand with the documents in hand? It seems to me the answer is clearly no. We could claim, the company could claim that privilege when the witness took the stand, because all that had happened in response to the subpoena duces tecum was that a representative of the company brought the documents to court. I think that witness on the stand would have to identify the documents and could make no claim of privilege up to that time. The claim would properly be assertable when it was sought by 3700 the Government to introduce those papers in evidence; and the fact that, the claim being made at that time, the Government contended we hadn't prior thereto moved to quash the subpoena, would never by any court be construed as a waiver of the assertion of the privilege on the stand.

Now it seems to me here that Certain-teed, not having moved to quash the subpoena, the Grand Jury subpoena, didn't waive anything. Its representative still had the right to claim the privilege before the Grand Jury. That, Mr. Redfield did. He claimed it. That is what caused the telephone conversation. As a result of the telephone conversation, he went in before the Grand Jury, still not waiving his privilege, merely identifying the document, so that the privilege was not waived then. Therefore, it follows it can be now asserted by Certain-teed.

Mr. ADAMS. I thought that I had, in answer to Judge Stephens' question, said that I didn't think there was any waiver by Redfield before the Grand Jury.

Mr. BROMLEY. You did, yes.

Mr. ADAMS. Maybe I didn't make that clear.

Justice STEPHENS. Well, what I understood you to say was that there was never an opportunity to claim privilege until you got to this Court.

Mr. ADAMS. I think I did say that originally, and I 3701 later changed my position.

Justice STEPHENS. Yes, that is right. That is what caused me to ask these questions.

Mr. ADAMS. I thought I made my position consistent with what Mr. Bromley is now saying, although I am grateful to him for raising it again.

Mr. BROMLEY. Now I go to another point.

In paragraph 1 of the Government's memorandum upon the admissibility of Government's Exhibit 233 for Identification, the third sentence of the first paragraph says:

"No question was raised as to its relevance or materiality."

If that be so, it was only because we had no opportunity to raise it, since all of the argument took the form of an objection on the ground of privilege. I desire to say now that it is our position that this document is immaterial and irrelevant, and I should think now probably was the proper time for us to note that objection. It hasn't anything to do with any charge in the complaint, and clearly is not in furtherance of any conspiracy charged in the complaint, and I think it is clearly immaterial.

If both objections, however, be overruled by the Court and the document be received in evidence, then the defendants certainly desire that the Government be ordered to recall Mr. Redfield so that we can cross-examine him upon the contents of the memorandum, an opportunity to do which has not yet been accorded us.

So I would like the record to show, if I may, please, that we now object to the reception of this document on the ground that it is immaterial and irrelevant because not in furtherance of any conspiracy charged in the complaint; and, secondly, that if it be received, Mr. Redfield should be produced in order to be cross-examined by the defendants upon the document.

Justice STEPHENS. What do you say, Mr. Bromley, to the apparent contention of the Government that although Mr. Redfield did claim the privilege, he was later told by Mr. Dowd—if we take the telephone conversation as proved and as legally dependable—that they had nothing to conceal, that they had turned their documents over to the Government, and that he could go ahead and testify?

Mr. BROMLEY. I listened carefully to the reading of that testimony. I thought that testimony was qualified by his specific testimony in which he said: "You may identify the document." I thought the words "go ahead and testify, we haven't anything to conceal", merely meant that he was at liberty to go in before the Grand Jury and testify to anything they asked him, but with respect to this privileged document he must stop with its identification.

Mr. STEFFEN. If there is any doubt on that, Your Honor, the witness, Mr. Redfield, said:

3703 "I explained what I have just explained to you"—that is, that there was a claim of privilege concerning this particular exhibit, and then Mr. Dowd replied, as it appears in the transcript, " \* \* \* we have nothing to hide, we have thrown our records open to the Department of Jus-

tice," and you are permitted to go ahead and testify.

Before the Grand Jury, as Mr. Adams also pointed out, he also said that he was authorized to identify, and the two things are not dissimilar and not in conflict. He was authorized, with regard to this particular document—this was the occasion of the telephone call—to go ahead and present it before the Grand Jury and identify it and testify concerning it, if necessary. It so happened that we asked him no questions. The document spoke for itself and it was duly identified and became a Grand Jury exhibit.

Mr. ADAMS. I think I should make one statement there. We think that the conversation sums up to being an authorization only to identify.

I would like to add one further thought, that if it is believed that there is any continuing authorization to Mr. Redfield, that that does not exist, and if we have power to revoke, if it was ever given, we do revoke it.

Justice STEPHENS. What is this other matter you wish to present, Mr. Steffen?

3704 Mr. STEFFEN. It is a matter with regard to witnesses, and I perhaps should present it just now. It will take just a moment.

Justice STEPHENS. If it will take only a moment.

Mr. STEFFEN. After Your Honor's statement of the recess, we looked over the different witnesses we were going to call, and we have not called either Mr. Gloyd or Mr. Chism from the Texas Company. You will recall that Mr. Gloyd was supposed to be here in December of last year, then he was excused until January; and in January Mr. Johnston, I believe, stated that he was unable to travel. The situation now is that he has not testified.

Our suggestion is this: In view of Mr. Gloyd's health and his advanced age—I think he is 79—that we co-operate with Mr. Johnston and take Mr. Gloyd's deposition. We suggest March 7 as the date; and while we are down there taking the deposition of Mr. Gloyd, we might also take Mr. Chism's deposition. If that is agreeable to all parties, we will give the necessary notices and that can be taken during the Court's recess.

3705 Mr. JOHNSTON. Now if the Court please, as to Mr. Chism, he is awaiting the call of the Government. He has been under subpoena, but is about the only one left there to run that business, and I asked that we be given at least a week's notice when they wanted him. If they would rather take his deposition in Oklahoma, and



not have him come here, that would be entirely satisfactory.

As to Mr. Gloyd, the story is quite different. He is in bad health, and getting worse instead of better. The Government knows this —

Justice JACKSON (interposing). What is wrong with him, Mr. Johnston?

Mr. JOHNSTON. He has a bad heart condition and arteriosclerosis of the brain. His doctors refuse him the privilege of going anywhere or doing anything. The FBI, at Government counsel's suggestion I presume, have been making an investigation, and have made a report on him. FBI representatives recently talked to his doctors, and the doctors tell me that it would be extremely hazardous to put him on the witness stand either for a deposition, or to bring him here, that they wouldn't take the responsibility for the results.

He has had two or three attacks, one very serious one, and his private physician told me that he might drop over dead on the witness stand. Now under these circumstances, if necessary we will make a showing—maybe before this case ends he might show an improved condition, but 3706 his doctors say no, that his condition will gradually get worse instead of better.

Now in that connection, I stated to counsel a few days ago that as to all of the documents they may want to identify if they had Mr. Gloyd on the witness stand, if they would designate them I would go over them with counsel, and I thought we would have no trouble about the identification of any documents that he could identify if he were on the stand.

For the Court's information in that connection, our documents and records were not subpoenaed. The Government requested that we furnish them, and thus avoid a subpoena, which we did.

Then the Government made photostatic copies of all of those records, and returned the originals to us, or the copies, whichever the case may have been.

So that the Government now has a complete file of such documents and records and correspondence as we had through the years.

Therefore, my suggestion to counsel is that we might sit down and go through all of these documents and see which ones they want to use that Mr. Gloyd could identify if he were on the stand.

I think perhaps that is the best way to reach this thing,

because I say to the Court, seriously, that I am not going to take the responsibility of suggesting that Mr. Gloyd, in his present state of health, take the witness stand.

3707 Mr. STEFFEN. Mr. Johnston has referred to an FBI report, and we have asked for information concerning Mr. Gloyd's health.

As we get it, he spends from two to three or more hours a day in his office, daily, and from the standpoint of a layman he looks to be in very good health.

He has, I think, two or three doctors. One, Dr. Langston, advised that he believed Gloyd was physically able to make a trip to Washington, but felt that the emotional upset of a trial would be worse than the trip. However, Dr. Langston saw no objection to taking a deposition if Gloyd would not be subjected to grueling examinations. Both doctors, that is, I believe, Dr. Langston and Dr. Fishman, believed that Gloyd would make an unsatisfactory witness due to his failing memory in the past two years.

Our thought on the matter of taking depositions was that we have some matters in addition to simply identifying documents, that we would like to have Mr. Gloyd's testimony on, if he still remembers such matters, and we feel that we should have an opportunity to develop that. Our purpose would be to conform as nearly as possible to Mr. Gloyd's requirements, maybe interrogating him one or two hours a day. In fact the entire examination will be short.

On the other point, of making a stipulation, we have had very poor success in getting any stipulations on the facts in this case, at all, and while I am sure Mr. Johnston would be glad to co-operate, our experience is that the result finally turns out to be that we don't agree, and that we have wasted a lot of time.

3708 It occurred to us, purely as a matter of cooperation, that if we could go down and take Mr. Gloyd's deposition, conforming it to his health requirements, that we could also take Mr. Chism's deposition at the same time, and we would do that of course recognizing that we are perhaps losing the advantage of having the Court see Mr. Chism and determining whether his testimony is good or bad. But we had thought that we would do that.

Justice STEPHENS. Well, there is nothing before the Court that the Court can rule upon. The Court will say that if there is a showing made by Mr. Johnston, through dependable physicians, that it would injure the health or threaten the life of Mr. Gloyd, the Court would hesitate

very much to order a deposition taken. I assume the Government would not want to take it under those circumstances?

Mr. STEFFEN. That is correct, your Honor.

Justice STEPHENS. If there is a dispute between doctors on the subject, then the Court will have to make the usual determination of fact. The Court urges counsel on both sides to work this matter out by cooperation rather than by Court order, if that is possible of accomplishment. That is all we can do at the present time. If you cannot  
3709 come to an agreement during the next day or so, upon this matter, or before we adjourn for the recess the latter part of this month, then you will have to make your motion, I suppose, for the taking of depositions, and serve the same, and Mr. Johnston will have to take such steps as he sees fit to proceed to protect himself.

Mr. STEFFEN. We will give him due notice as to the time, so there will be no question as to the dates.

Justice STEPHENS. Have you a witness for this afternoon?

Mr. STEFFEN. Oh, yes.

Justice STEPHENS. We will then recess until two o'clock. (Thereupon, at 12:30 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.)

